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314 S.W.2d 749 printed in FULL format.

W. E. Glidewell, O. J. Jones, Individually and for and on Behalf of all Members of Local Union 453 of the International Brotherhood of Electrical Workers, L. G. DeCamp and Louis O'Neal, Individually and for and on Behalf of all Members of 591 of Springfield, Missouri, of the Amalgamated Association of Street, Electric Railways and Motor Coach Employees of America, Plaintiffs-Appellants, vs. George K. Hughey, Dorsey Heer, C. Frank Knox, Herman Powell, Payton Enloe, Frank Clark, Herman Cox, David C. Scott and J. V. Cloud, Members of and Constituting the Board of Public Utilities of the City of Springfield, Missouri, Daniel C. Rogers, G. H. Frieling, Albert Fults, Carl L. Spaid and John A. White, Members of and Constituting the Missouri State Board of Mediation, John M. Dalton, Attorney General of the State of Missouri, Phil M. Donnelly, Governor of the State of Missouri, and The City of Springfield, Missouri, a Municipal Corporation, Defendants-Appellants

No. 45972

Supreme Court of Missouri En Banc

314 S.W.2d 749; 1958 Mo. LEXIS 656; 41 L.R.R.M. 2100

07/14/58

PRIOR HISTORY: [**1]

From the Circuit Court of Greene County

Civil Appeal From Action For Declaratory Judgment

Judge Warren L. White

Affirmed in Part - Reversed in Part - Remanded With Directions

CORE TERMS: charter, public utilities, declaration, mediation, King-Thompson Act, wages, duty, collective bargaining, second class, budget, l.c, bargaining, right to enter, promoted, municipally, discharged, applicability, transferred, favoritism, ordinance, municipal, tenure, hired, merit system, qualifications, disbursement, proprietary, distinctly, abolished, two-thirds

OPINIONBY: Hyde, J.

OPINION: [*750]

Declaratory judgment action by plaintiffs, representing labor unions, for declarations as to the rights of the parties under Art. 16 of the Charter of the City of Springfield; that unions have the right to enter into collective bargaining agreements with the Board of Public Utilities of the City respecting wages, hours and working conditions, as set forth in certain proposed contracts; and that the State Board of Mediation has jurisdiction to furnish mediation services in any labor disputes that might arise between the unions and the Board. The court entered judgment making some declarations favorable to plaintiffs' contentions but declaring that the Board did not have the right to enter into the proposed contracts; and both plaintiffs and defendants have appealed.

The case was tried on an agreed statement of facts, and some other evidence, including proposed contracts submitted to the Board by the unions, the Constitution [*751] and By-Laws of the unions, membership [**2] applications and obligations of union members and the new Charter of the City. The City of Springfield adopted its own charter on March 17, 1953 in accordance with the provisions of § 19, Art. VI, 1945 Constitution. Prior to that time, it had been a city of the second class and had acquired an electrical generating and distribution system and a bus transportation system, which were operated by a Board of Public Utilities under authority of §§ 91.330-91.440. (Statutory references are to RSMo. and V.A.M.S.) Prior to the adoption of the charter, and after our decision in *State ex rel. Moore v. Julian, 359 Mo. 539, 222 S.W.2d 720,* concerning the applicability of the King-Thompson Act to cities of the second class, the former Board, operating under §§ 91.330-91.440, made collective bargaining agreements with the unions concerning wages, hours and working conditions. After the adoption of the charter, the City notified the unions that it considered it had no legal authority to enter into such contracts and that the State Board of Mediation had no jurisdiction over it.

The judgment entered made the following declarations:

"1. Defendants George K. Hughey, Dorsey Heer, Herman Cox, [**3] Herman Powell, C. Frank Knox, Frank Clark, Peyton Enloe, David C. Scott and J. V.

Cloud, members of the Board of Public Utilities of Springfield, Mo., are agents of the said City entrusted with the duty and clothed with the power to operate the utilities owned by the said City, and as such are proper parties to this action since their powers and duties are affected by this judgment.

"2. The King-Thompson Act, Chapter 295, R.S. 1949, is a valid legislative enactment of the State, and applies to public utilities municipally owned as well as those privately owned.

"3. The State Board of Mediation, created by said King-Thompson Act has jurisdiction to use its mediation services in labor disputes between the Board of Public Utilities of the said City and its employees.

"4. By an Act of 1945, Secs. 91.330 to 91.440 R.S. 1949, the State effected a separation of governmental and proprietary functions of cities of the second class, which then included the City of Springfield, and provided that as to such cities the operation of municipally owned utilities was a proprietary function.

"5. The charter of the said City, adopted March 17, 1953, by popular vote did not materially [**4] alter the status of the City Utilities of Springfield as a proprietary function of the City.

"6. Under the laws of the State and the said charter of the City of Springfield the said City, acting through its Board of Public Utilities, has the power to enter into collective bargaining agreements with its employees operating said Utilities relating to wages, hours and working conditions, subject to certain limitations hereinafter mentioned.

"7. Under said charter, employees of the Utilities can be hired, promoted, reduced or discharged only in accordance with rules established by the Board. Therefore, the said Board of Public Utilities cannot enter into such agreements providing:

"A. A closed shop, or the employment of only members of a labor union, or a requirement that employees join a union, or that employees shall not join a union.

"B. That employees be promoted, demoted, laid off, reemployed or discharged according to seniority or any other form of favoritism.

"C. Approval by a union or any board or committee of a union as a prerequisite to the employment or promotion of any person.

"D. Recognition of a labor union as the sole bargaining agent for all of the [**5] employees of said Board, but may bargain with a union as agent for such employees as have chosen the union as their bargaining representative.

"8. For the foregoing reasons the Board of Public Utilities of said City does not have the right to enter into agreements as [*752] set forth in exhibits A and B attached to plaintiffs' second amended petition."

We have jurisdiction because this appeal involves the construction of § 29, Art. 1, Constitution, and the constitutionality of the King-Thompson Act, Chapter 295, §§ 295.010-295.210. State officers also are parties.

Before reaching the merits, it is necessary to consider defendants' contention that the members of the Board are not proper parties to this action. Defendants say this is true because the Board does not have power or capacity to sue or be sued as such and the individuals who constitute the Board at any time cannot in their individual capacities bind the Board or the City. It is true, of course, that the City is the real party and the necessary party defendant; and, as defendants say, citing 64 C.J.S. 1034, § 2195, and McQuillin, Municipal Corporations, 3rd Ed. § 49.16, suits against a municipal corporation [**6] should be in its corporate name and not against its officers, corporate authorities or the individuals composing them. However, that does not mean that the individual members of the Board are not proper parties in a declaratory judgment suit in which the City is made a party. (See 39 Am.Jur. 853, § 5, also p. 889, § 27; 67 C.J.S. 889, § 1; *Brotherhood of Stationary Engineers v. City of St. Louis, Mo. App., 212 S.W.2d 454, 458; Durwood v. Dubinsky, Mo. Sup., 291 S.W.2d 909.)* § 507.040(1) (which is the same as Federal Rule [20]) gives broad authority for permissive joinder of defendants; and it was intended to extend to all civil actions the principles of permissive joinder which had been followed in equity. (See also § 527.110.) This authority should be liberally construed in a declaratory judgment suit, which has its historical affinity in equity, and with which may be heard claims for affirmative equitable relief. (See *Liberty Mutual Ins. Co. v. Jones, 344 Mo. 932, 130 S.W.2d 945; Union National Bank v. Jessell, 358 Mo. 467, 215 S.W.2d 474.)* Therefore, in view of the duties imposed upon the members of the Board by the City charter and the equitable remedies that would be [**7] available against them in connection with this action, we hold they were proper parties.

On the merits, plaintiffs say the court's declarations were correct concerning the validity and applicability of the King-Thompson Act and the separation of the governmental and proprietary functions, with authority to make collective bargaining contracts, but contend the court erroneously declared the Board's power to so contract was limited to the extent stated in paragraph 7, and in subparagraphs A to D thereof, and in paragraph 8. Defendants say the declaration in paragraph 8, that the

Board does not have the right to enter into the specified proposed agreements, is correct but that the court erred in making every other declaration and also contend that all the other declarations are merely advisory in character as to abstract matters without the purview of the Declaratory Judgment Act. We think more is presented here than merely the authority to enter into the two specified proposed contracts because the City contends it has no authority to make any contract with plaintiffs about wages, hours, and working conditions and plaintiffs seek a declaration of the rights of the parties to make [**8] such contracts under § 16 of the City's Charter. We hold there is a justiciable controversy between the unions and the City as to the authority of its Board to enter into collective bargaining contracts relating to wages, hours and working conditions, the validity and applicability of the King-Thompson Act to the public utilities owned by the City and the jurisdiction of the State Board of Mediation in connection with their operation. (See *City of Nevada v. Welty, 356 Mo. 734, 203 S.W.2d 459; City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539; King v. Priest, 357 Mo. 68, 206 S.W.2d 547; Tietjens v. City of St. Louis, 359 Mo. 439, 222 S.W.2d 70; City of Camdenton v. Sho-Me Power Corp., Mo.Sup., 237 S.W.2d 94.)* The authority of the City, as a city of the second class, "to make collective bargaining contracts, [*753] with labor unions representing city employees, concerning wages, hours, collection of union dues, and working conditions", was the issue in the Clouse case. We have the same issue here concerning the authority of the City under its constitutional special charter but the effect of the King-Thompson Act (adopted after the Clouse case arose) must also be considered [**9] in determining it. The controversy would not be settled by merely deciding that the City did not have authority to make the two specified proposed contracts because the real issue is whether or not, under the City's present charter, wages, hours and working conditions of city employees in its electric and transportation systems can be a matter of bargaining and contract to any extent at all. In the Tietjens case the justiciable controversy was the authority of the City of St. Louis to control the rental of property; here it is authority of the City of Springfield to enter into contracts fixing wages, hours and working conditions of city employees. § 527.020 provides for a declaration of rights, status or other legal relations under any instrument, statute, ordinance, contract or franchise. Certainly the rights, liabilities, duties and obligations of the parties under the City's charter, with respect to the matters herein involved, are within this authority; and we, therefore, hold that an actual controversy exists about them between the parties hereto whose interests concerning them we find to be adverse in fact.

Plaintiffs rely on *State ex rel. Moore v. Julian, supra,* but [**10] what we held there (222 S.W.2d, l.c. 725) was that the mediation provisions of the King-Thompson Act must be construed as applying to labor disputes in municipally owned public utilities in cities of the second class. Of course, that ruling was based on the view expressed in the Clouse case (206 S.W.2d, l.c. 546) that the Legislature might separate corporate functions, and employees engaged therein, and provide for their operation and management in some manner distinctly apart from other city functions so that employer and employee relations could be handled on a basis similar to private industry; and it was considered that the Act of 1945 (Laws 1945, p. 1270, now §§ 91.330-91.440) had made a sufficient separation to make the King-Thompson Act applicable. However, the City of Springfield was not a party to the Julian case and the extent of its authority to make any collective bargaining contracts at that time was not directly raised or decided; nor was the validity of the 1945 Act as authority for such contracts considered. The decision as to the authority of the State Board of Mediation in second class cities was based upon both acts construed together. In any event, that case [**11] does not pass upon and is not controlling in determining the authority of the City under its present charter to engage in bargaining with its employees. Therefore, we will consider the situation presented by the new charter.

The charter provides for a "council-mananger government" and that "all powers of the city shall be vested in an elective council", subject only to limitations of the State Constitution and the charter, "which shall enact local legislation, adopt budgets, determine policies, and appoint the City Manager." (1.2) Among the specifically stated powers of the Council to act by ordinance are: "Purchase, hire, lease, construct, own, maintain, and operate public utilities" (2.16[2]); "contract and be contracted with, and sue and be sued" (2.16[25]); "establish and enforce gas, electric and public transportation rates, and rates and charges for all other utilities owned and operated or services furnished, by the City" (2.16[31]); and "provide for all personnel necessary to carry on the function of all departments and agencies of the City." (2.16[38]) The Charter also provided: "Except as specifically otherwise authorized or provided in this charter all Boards, [**12] Departments and Agencies of the City shall be subject to legislative control of the City Council." (15.4) The Charter in Article 16 further provided: "Public utilities now owned [*754] or which may in the future be acquired, shall be controlled and operated by a Board known as the Board of Public Utilities" (16.2[1]); and provided for a Board of nine members (16.2[2]) nominated by the Mayor and approved by a majority vote of the Council. (16.3) The duties of the

Board were "to take charge of and exercise control over any public utilities now owned or operated by or hereafter acquired by the city and all extensions thereof and the appurtenances thereto belonging, and with the right and power to establish, maintain and operate such park and recreation areas and facilities in the manner and as the Board may determine, with plans for the development of parks and recreational areas having first been submitted to and approved by the City Council, upon real estate and properties acquired or held in connection with utilities as a part of said utilities operations." (16.6) Among the powers of the Board were "to hire such persons in the manner herein provided as are necessary to operate [**13] the said utilities, to agree upon or provide the terms of their compensation, to discharge the same." (16.7) The manner referred to was thus stated (16.14): "The said Board shall appoint and may remove the manager; who may, with the approval of the Board, appoint and remove his assistants and the heads of departments; all other employees shall be hired, promoted, reduced or discharged in accordance with rules established by the Board designed to secure and retain employees strictly on the basis of their merit and without regard to favoritism. The Board shall determine the duties and compensation of all employees. No individual member of the said Board shall request or recommend the employment retention, promotion, reduction, retardation or discharge of any employee and such request or recommendation shall be sufficient cause for removal of such Board member from office."

Other provisions concerning control of the Council are that obsolete or surplus property may be sold or disposed of by the Board "in the manner provided by ordinances for the disposition of such property by the City" (16.6); that the Board must prepare and submit to the Council, not less than 30 days prior to the [**14] end of the fiscal year, a budget showing its estimated revenue and expenditures for the coming year, the Council having power to reduce or delete items of expenditures (16.8); that approval of the budget by the Council "shall be deemed to be an appropriation of the money authorized for disbursement thereby" (16.9); that records of receipts and disbursements be furnished to the City Director of Finance and be open to inspection of the Council at any time, with quarterly reports of its transactions to the Council (16.11); that purchases be made in accordance with rules made by the Board, approved by the Council, but "in such manner as to take advantage of the combined purchasing power of the City as a whole wherever practicable" (16.12); that rates shall be fixed by the Board subject to the approval of the Council (16.13); and that the Board and Council "shall have joint authority and control over the reserves and funds of such utilities as are not required to pay the usual and proper costs of operation, depreciation, etc." requiring a two-thirds vote of the Council and Board in joint session for action if the Council does not approve the Board's recommendations. (16.16) Finally it [**15] was provided (19.21): "Any Board established by the provisions of this Charter may be abolished and the facilities, powers and duties of said Board transferred to a department of the City Government either then existing or to be established by the City Council for the assumption thereof, upon the two-thirds majority vote of the total membership of the City Council and the Board being abolished meeting in joint session."

It seems apparent from these charter provisions that there is no separation of the corporate functions of the City concerning its public utilities and employees engaged therein with provisions for their operation in a manner distinctly apart from other City functions. On the contrary, these utilities and the employees engaged therein are clearly subject to and regulated by the exercise of the legislative powers of the City. Not only does the City Council have the [*755] final decision on the utilities budget, rates and disbursements but the Board may even be abolished and its facilities, powers and duties transferred to a department either then existing or to be established by the City Council. It is true that the members of the Board have a vote on the matter [**16] of abolishment in a joint meeting with the Council and that a two-thirds vote of the joint meeting is required for this purpose. (This is also required for certain uses of reserves and funds.) Thus the members of the Board are made in effect ex officio members of the Council for certain matters upon which they may vote. This is certainly the exact opposite of the kind of separation referred to as required in the Clouse and Julian cases and shows that the regulation and control of utilities is wholly within the legislative powers of the City. Instead of being set up in the nature of a separate municipal corporation with power to sue and be sued (which is not granted) the Board is only an administrative body or department of the City Government, with certain legislative powers delegated to it by the Charter with reference to employees (as hereinafter shown) and with its members being part of the legislative department of the City for certain purposes. It may be noted also that the Board has functions concerning and control over establishment and operation of parks and recreation areas, which has to some extent been held to be a governmental function. (63 C.J.S. 317, § 907, p. 686, [**17] § 1057.) This authority also is subject to the action and approval of the Council.

The Charter provision as to employees is very different from the one in the statute considered in the Julian case

(222 S.W.2d, l.c. 722) under which employees served only during the pleasure of the Board. The Charter provision (16.14) is that "employees shall be hired, promoted, reduced or discharged in accordance with rules established by the Board designed to secure and retain employees strictly on the basis of their merit and without regard to favoritism." This is a delegation of legislative power by the Charter to the Board to set up a merit system of employment, separate from the merit system provided by the Charter (6.5, 6.6) for other City employees in its classified service. It is specified that this is to be done by "rules established by the Board" and the Board has no authority to do it in any other way, certainly not to contract away this authority. If this duty is legislative, it cannot become a matter of bargaining and contract. (*City of Springfield v. Clouse, supra, 206* S.W.2d, l.c. 545; see also *City of Los Angeles v. Los Angeles Building and Construction Trades Council, (Cal.), [**18] 210 Pac.2d 305; Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So.2d 194; Mugford v. Mayor and City Council of Baltimore, (Md.), 44 Atl.2d 745; Detroit v. Division 26 of Amalgamated Assn. of Street, Electric Railway and Motor Coach Employees, 332 Mich. 237, 51 N.W.2d 228; New York Transit Authority v. Loos, 154 N.Y.S.2d 209; City of Cleveland v. Division 268 of Amalgamated Assn. of Street & Electric Railway & Motor Coach Employees, (Ohio), 90 N.E.2d 711; Weakley County Municipal Electric System v. Vick, (Tenn.) 309 S.W.2d 792;* McQuillin Municipal Corporations § 12.140).) As said in the Los Angeles case (210 Pac.2d, l.c. 311) "to hold to the contrary would be to sanction government by contract instead of government by law." Upon consideration of the Charter as a whole, we think the matter of qualifications, tenure, compensation and working conditions in this public service involves the exercise of legislative powers. The City Council controls the amounts available for compensation by its authority over the rates, budget and appropriations. The Board has authority only to establish and follow merit system rules. The Legislative Department of the City even has [**19] the ultimate power to abolish the Board and have its functions transferred to another department of the City government then existing or established by the Council for that purpose. It is a familiar principle of constitutional law that no legislature can bind itself or its successor [*756] to make or continue any legislative act. As we held in the Clouse case, § 29, Art. I, Constitution, does not confer any collective bargaining rights upon public officers or employees in their relations with municipal government and we hold that it is not applicable to the situation in this case because there is no such separation of the public utilities of the City from its general governmental functions and legislative powers as would be required to make it applicable. Therefore, our conclusion is that under the present Charter of the City the whole matter of qualifications, tenure, compensation and working conditions in the City's public utilities involves the exercise of legislative powers and cannot become a matter of bargaining and contract.

As to the jurisdiction of the State Board of Mediation, we think it must be held that it has no jurisdiction in municipalities in which there [**20] is no separation of municipally owned public utilities with provision for their operation in some manner distinctly apart from other city functions so that their employer and employee relations could be handled on a basis similar to private industry. That is the construction we place on the Julian case and we think must follow from our construction of § 29, Art. I, Constitution. Therefore, we hold that where, as here, the whole matter of qualifications, tenure, compensation and working conditions in the City's public utilities involves the exercise of the City's legislative powers, so that these matters cannot become a matter of bargaining and contract, then the King-Thompson Act is not applicable and the State Board of Mediation is without jurisdiction. Since we hold the King-Thompson Act is not applicable in this case, the questions raised herein as to its constitutionality become moot questions in this case and, therefore, will not be considered herein.

The judgment and decree of the Court is affirmed as to declarations 1 and 8 and reversed as to all other declarations and the cause is remanded with directions to make new declarations in lieu of declarations 2 to 7 inclusive [**21] in accordance with the views herein expressed.

All concur.

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M. D. Lightfoot, J. F. Jones, Pete Kritikos, Robert L. Hanson, John A. Stever, E. E. Wilson, U. R. Sullivan, Melvin E. Royster, Josephine Headley, A. L. Smith, Mrs. Ralph Reed, Lillian Sanday Sutton, J. W. Hughlett, Mary Pharr, Springfield Ice and Refrigerating Company, a Corporation, J. V. Boswell, Nelson Hoover, Joe Gold, E. B. Harris, George Walters, Sam B. Hoefgen, W. N. Hackney, L. E. Wright, K. C. Wright, R. W. Quigg, J. C. Waggoner, Ben Gifford, Lester Cline, Tom Bater and R. Cantrell, Plaintiffs-Respondents, v. City of Springfield, Missouri, a Municipal Corporation, and Edwin C. Rice, Larry L. Blanchette, Lloyd R. Carter, Charles L. Chalender, George K. Hughey and William A. Lincoln, who constitute the Board of Public Utilities of said City, Defendants-Appellants

No. 41904

Supreme Court of Missouri

361 Mo. 659; 236 S.W.2d 348; 1951 Mo. LEXIS 555

January 8, 1951

SUBSEQUENT HISTORY: [***1]

Motion for Rehearing or to Transfer to Banc Overruled February 8, 1951.

PRIOR HISTORY:
Appeal from Christian Circuit Court; Hon. Tom R. Moore, Judge.

DISPOSITION: Reversed and remanded (with directions).

CORE TERMS: consumer, natural gas, impounded, reduction, distributor, interstate, public utilities, effective, unjust enrichment, intrastate commerce, state law, allocable, lawfully, customers, intrastate, excessive, regulatory authority, judgment declaring, new rate, retroactively, instituted, collected, declaratory judgment, unconditionally, conditional, depository, municipal, fixing, Natural Gas Act, time to time

HEADNOTES:
PUBLIC UTILITIES: Interstate Gas Rate Reduction: Federal Power Commission Without Jurisdiction Over Local Rates. While the reduction of interstate gas rates ordered by the Federal Power Commission was intended to benefit ultimate consumers, said Commission is without jurisdiction to regulate local intrastate rates or to order a reduction thereof in order to give the ultimate consumers the benefit of the interstate reduction.

PUBLIC UTILITIES: Interstate Gas Rate Reduction: Impounded Fund Subject to State Law. The distribution of the fund impounded in a federal court during the unsuccessful appeal of a rate reduction on interstate gas rates is governed by state law.

PUBLIC UTILITIES: Municipal Corporations: Public Service Commission: Utility Company Acquired by City: Respective Powers of Commission and City. Before the City of Springfield acquired the gas company the Public Service Commission had power to fix rates but not to declare or enforce any principles [***2] of equity. After the city acquired the properties, said city had the right to fix the rates.

PUBLIC UTILITIES: Municipal Corporations: Equity: Interstate Gas Rate Reduction: Ultimate Consumers Not Entitled to Impounded Fund: No Unjust Enrichment. The gas company and its successor the City of Springfield charged the consumers the lawful rate and were entitled to receive their respective shares of the fund impounded during the appeal of the interstate gas rate reduction. The city has acquired the interest of the gas company in such fund. The ultimate consumers have no right to share in said fund. There was no unjust enrichment.

ACTIONS: Declaratory Judgment Ordered. A declaratory judgment is ordered.

SYLLABUS: Declaratory judgment action. Plaintiffs are gas consumers in the City of Springfield. The Federal Power Commission ordered a reduction in interstate gas rates and a fund was impounded in a federal court during the pendency of the appeal. The City of Springfield acquired the gas company, together with its rights in the impounded fund, while the appeal was still pending. Such rights of both the gas company and sub-

sequently the city are controlled by state [***3] law, and not by the Federal Power Commission. The city is entitled to receive said fund. A judgment awarding plaintiffs part of the fund is reversed and remanded.

COUNSEL: A. P. Stone, Jr., for appellants.

(1) Plaintiffs' rights are to be determined under Missouri law. Cities Service Gas Co. v. Federal Power Commission, 176 F. (2d) 548. (2) Natural gas act is limited to regulation of sales in Interstate Commerce for resale, leaving the states regulation of intrastate distribution and sale. 15 U.S.C.A., Sec. 717(b); Central States Electric Co. v. Muscatine, 324 U.S. 138, 65 S. Ct. 565, 89 L. Ed. 801; Cities Service Gas Co. v. Federal Power Commission, supra, l.c. 552. (3) Plaintiffs have no right, title or interest in and to impounded fund, and defendants are entitled to declaratory judgment to that effect. Straube v. Bowling Green Gas Co., 227 S.W. (2d) 666; State ex rel. Watts Engineering Co. v. Public Service Comm., 275 Mo. 108, 204 S.W. 385; Wright v. Central Kentucky Natural Gas Co., 297 U.S. 537, 56 S. Ct. 578, 80 L. Ed. 850, affirmed 260 Ky. 361, 85 S.W. (2d) 870. (4) Straube v. Bowling Green Gas Co., supra, was ruled correctly and is in harmony with case law of this [***4] and other jurisdictions. Relationship between local distributors and ultimate consumers was contractual. St. Louis Brewing Assn. v. St. Louis, 140 Mo. 419, 37 S.W. 525. (5) Since each ultimate consumer paid to local distributor a single, indivisible, fixed and definite sum computed pursuant to legally established rate schedules and pursuant to contract, no portion thereof can be recovered. Cupples Co. v. Mooney, 25 S.W. (2d) 125. (6) Such recovery may not be had on theory of constructive trust or unjust enrichment. Consolidated Flour Mills v. Ph. Orth Co., 114 F. (2d) 898; Moundridge Milling Co. v. Cream of Wheat Corp., 105 F. (2d) 366; Continental Baking Co. v. Suckow Milling Co., 101 F. (2d) 337; Mattingly v. G.B.R. Smith Milling Co., 183 Miss. 505, 184 So. 635; J.A. Campbell Co. v. Holsum Baking Co., 15 Wash. (2d) 239, 130 P. (2d) 333. (7) Not having been deceived or defrauded, ultimate consumers lost all title and interest in funds paid under legally established rates. O'Connor-Bills, Inc., v. Washburn Crosby Co., 20 F. Supp. 460; Johnson v. Igleheart Bros., 95 F. (2d) 4, certiorari denied 304 U.S. 585, 58 S. Ct. 1058, 82 L. Ed. 1546; Golding Bros. Co. v. Dumaine, 93 F. [***5] (2d) 162, certiorari denied 303 U.S. 660, 58 S. Ct. 764, 82 L. Ed. 1118. (8) Money paid voluntarily and with full knowledge of facts cannot be recovered. Pure Oil Co. v. Tucker, 164 F. (2d) 945; Heckman & Co. v. I. S. Dawes & Son, Inc., 12 F. (2d) 154; Ferguson v. Butler County, 297 Mo. 20, 247 S.W. 795; Wilkins v. Bell's Estate, 261 S.W. 927. (9) Plaintiffs are not entitled to declaratory judgment on theory of constructive trust. Defendants have not been guilty of fraud, actual or constructive, which is essential element of constructive trust. Suhre v. Busch, 343 Mo. 679, 123 S.W. (2d) 8; Beach v. Beach, 207 S.W. (2d) 481; Gwin v. Gwin, 219 S.W. (2d) 282. (10) To establish constructive trust, proof must be so clear, cogent, unequivocal and positive as to exclude every reasonable doubt. Vardell v. Vardell, 222 S.W. (2d) 763; Trieseler v. Helmbacher, 350 Mo. 807, 168 S.W. (2d) 1030; Tobin v. Wood, 159 S.W. (2d) 287. (11) Constructive trusts are predicated on unjust enrichment. Lucas v. Central Missouri Trust Co., 350 Mo. 593, 166 S.W. (2d) 1053; Suhre v. Busch, 123 S.W. (2d) l.c. 16; Equity Corp. v. Groves, 295 N.Y. 8, 60 N.E. (2d) 19; Metzger v. Cruikshank, 162 Pa. Sup. 280, [***6] 57 Atl. (2d) 703; Union Guardian Trust Co. v. Emery, 292 Mich. 394, 290 N.W. 841. (12) There is no unjust enrichment where, as in the case at bar, ultimate consumers never paid and distributors never collected more than legally established rates. Straube v. Bowling Green Gas Co., supra, l.c. 671. (13) Declaratory judgment sought by plaintiffs would violate established principles of Missouri law governing distributors and ultimate consumers. Public Service Commission had exclusive jurisdiction of rates of the Springfield Company, and courts had no jurisdiction to determine such rates nor to outline theory upon which they should have been established. Secs. 5645, 5646 (12), R.S. 1939; State ex rel. Kansas City P. & L. Co. v. Buzard, 350 Mo. 763, 168 S.W. (2d) 1044; May Dept. Stores Co. v. Union Electric L. & P. Co., 341 Mo. 299, 107 S.W. (2d) 41; State ex rel. Fed. Reserve Bank of K.C. v. Public Service Commission, 239 Mo. App. 531, 191 S.W. (2d) 307. (14) Judicial review of rates of the Springfield Company could have been had only in strict accordance with statutory procedure; and, upon such review, courts would have been limited to affirmance or reversal of orders of Public Service [***7] Commission. Sec. 5690, R.S. 1939; State ex rel. Public Service Commission v. Padberg, 346 Mo. 1133, 145 S.W. (2d) 150; State ex rel. Chicago Great Western Ry. Co. v. Public Service Commission, 330 Mo. 729, 51 S.W. (2d) 73, certiorari denied 287 U.S. 641, 53 S. Ct. 89, 77 L. Ed. 555; Peoples Tel. Exch. v. Public Service Commission, 239 Mo. App. 166, 186 S.W. (2d) 531. (15) The Springfield Company could not have accepted more or less than established rate. Sec. 5646 (12), R.S. 1939; Sonken-Galamba Corp. v. Mo. Pac. Ry. Co., 225 Mo. App. 1066, 40 S.W. (2d) 524. (16) Public Service Commission may make prospective changes in rate schedules, but there can be no retroactive recovery of monies paid under approved rate schedules. May Dept. Stores Co. v. Union

Electric L. & P. Co., 107 S.W. (2d) l.c. 57; State ex rel. Kansas City P. & L. Co. v. Buzard, 168 S.W. (2d) l.c. 1046; Sonken-Galamba Corp. v. Mo. Pac. Ry. Co., 40 S.W. (2d) l.c. 529; Straube v. Bowling Green Gas Co., supra. (17) After March 26, 1945, city and its board of public utilities have had exclusive jurisdiction to fix rates without "any regulation except the will of its own citizens." Sec. 6609 (XXXVII), R.S. 1939 (reenacted [***8] Laws 1945, p. 1226). Laws 1945, p. 1270, as amended Laws 1947, p. 400; Secs. 6610.1 to 6610.11, Mo. R.S.A., 1939; State ex rel. City of Sikeston v. Public Serv. Commission, 336 Mo. 985, 82 S.W. (2d) 105; Missouri Power & Light Co. v. City of Pattonsburg, 343 Mo. 1128, 125 S.W. (2d) 20. (18) Public Service Commission law is unconstitutional and inapplicable as to municipally-owned utilities. City of Columbia v. State Public Service Commission, 329 Mo. 38, 43 S.W. (2d) 813. (19) Fixing of utility rates is legislative function. State ex rel. Laundry, Inc., v. Public Service Commission, 327 Mo. 93, 34 S.W. (2d) 37; State ex rel. Kansas City P. & L. Co. v. Buzard, 168 S.W. (2d) l.c. 1045; St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033. (20) Legislative action of city and its board of public utilities in fixing utility rates is not subject to review under Administrative Review Act. Art. V, Sec. 22, Constitution of Missouri; Laws 1945, p. 1504; Secs. 1140.101 to 1140.110, Mo. R.S.A., 1939; Bradford v. Phelps County, 357 Mo. 830, 210 S.W. (2d) 996.

Arch A. Johnson and W. D. Tatlow for respondents.

(1) It rests upon each party to establish [***9] their title. Webb v. City of East Prairie, 221 S.W. (2d) 153; Johnson v. McAboy, 350 Mo. 1086, 169 S.W. (2d) 932. (2) The facts being stipulated the proper judgment to be rendered was a mere legal conclusion. Union Natl. Bank of Wichita v. Lamb, 360 Mo. 81, 227 S.W. (2d) 60. (3) The act of both regulatory bodies must be read and construed together. It has been directly so decided by the Supreme Court of the United States and this court. Both bodies have a common purpose, that is, the protection of the ultimate consumers of natural gas from excessive rates. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 64 S. Ct. 281; Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 65 S. Ct. 829; Federal Power Commission v. Interstate Natural Gas Co., 336 U.S. 581, 69 S. Ct. 775; State ex rel. v. Hornes, 231 S.W. (2d) 185. (4) It has been repeatedly decided by the Supreme Court of the United States that the purpose of the Natural Gas Act was to occupy the field that the states could not enter and create a comprehensive scheme of regulation complementary in its operation to that of the states without confusion of functions. Public Utility Comm. v. United [***10] Fuel Gas Co., 317 U.S. 450, 63 S. Ct. 369, 87 L. Ed. 396; Federal Power Comm. v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 69 S. Ct. 1251, 93 L. Ed. 1499; Federal Power Comm. v. Eastern Ohio Gas Co., 70 S. Ct. 266; Smith v. Illinois Bell Tel. Co., 282 U.S. 133, 75 L. Ed. 255. These decisions will be followed by this court. Weiss v. Leaon, 225 S.W. 127. (5) The 1938 over-all rate is modified when the acts of both regulatory bodies are construed together. The 1938 overall rate as fixed and established by the Public Service Commission of Missouri in 1938 was, on July 28, 1943, modified and reduced by the act of the Federal Power Commission, acting in accordance with the Natural Gas Act in reducing the price that the Cities Service Gas Company could legally charge the distributor for natural gas in Springfield for resale to the ultimate consumers. (6) Each month when the money was received under the impounding order it related back to the time it was collected from the ultimate consumers. Knapp v. Alexander, 237 U.S. 162, 59 L. Ed. 891; Ozark Lumber Co. v. Franks, 156 Mo. 673; Williams v. State, 25 N.Y.S. (2d) 968. (7) The sole purpose of the stay order and the order of the [***11] court in impounding the fund was to make the collection by the distributor of that part of the fund so impounded conditional. The fact that there was a condition attached by the impounding of the fund cannot be ignored or denied. Lewis v. Lewis, 354 Mo. 415, 189 S.W. (2d) 557. (8) It is a condition subsequent. Morgan v. Stewart, 173 Mo. 207. (9) Horne v. Bland, 133 Ark. 567, 203 S.W. 5. The same result is reached under the well established equitable rule, where the purpose for which the transfer is made fails a constructive trust arises. Platte v. Huegel, 326 Mo. 776, 32 S.W. 605; Sanford v. Van Pelt, 314 Mo. 175, 282 S.W. 1022; 26 R.C.L., p. 1216. (10) A constructive trust is defined as the devise used by chancery to compel one who unfairly holds property to convey that interest to another to whom it justly belongs. It is equally applicable to which of the respective claimants should be given the fund in controversy. Wier v. Kansas City, 366 Mo. 882, 204 S.W. (2d) 268; Motley's Admr. v. Tabor, 271 S.W. 1064; Kerber v. Rowe, 348 Mo. 1125, 156 S.W. 925; Suhre v. Busch, 343 Mo. 679, 123 S.W. (2d) 8; Lucas v. Central Mo. Trust Co., 350 Mo. 593, 166 S.W. (2d) 1053; Bender v. [***12] Bender, 281 Mo. 473, 120 S.W. (2d) 929; Rich v. Williams, 22 S.W. (2d) 726; Proffit v. Houseworth, 231 S.W. (2d) 612. (11) Federal Power Commission v. Interstate Natural Gas Co. controls instead of the Muscatine, Iowa, case. Federal Power Commission v. Natural Gas Co., 336 U.S. 377, 93 L. Ed. 895, 69 S. Ct. 775. (12) Bowling Green Gas Co. case. That case was tried and submitted both in the trial court and the Supreme Court on the express admission that the schedule of rates fixed by

the Public Service Commission of Missouri alone controls. (13) In the instant case the Federal Court only referred to the state court the question of whether under state law the distributor, or the ultimate consumers, suffered a loss by the impounding of the fund. (14) The appellants' claim to title is based almost exclusively upon the Bowling Green Gas Company case which has no application except it very accurately defines the law of unjust enrichment as follows: "Appellants' (the ultimate consumers) right of recovery on any theory of unjust enrichment necessarily depends upon whether by the receipt of the fund respondent was enriched at the loss and expense of the appellants."

JUDGES: Van Osdol, C. [***13] Lozier and Aschemeyer, CC., concur.

OPINIONBY: VAN OSDOL

OPINION: [*664] [**349] Plaintiffs, individually and as representatives of a class (ultimate consumers of natural gas at Springfield, Missouri), instituted this action against defendant, City of Springfield, and against City's Board of Public Utilities, seeking a judgment declaring that the ultimate consumers are entitled to a fund of $ 803,366.37 allocable to the "city gate" of Springfield and now held in a depository pursuant to an order of the United States Circuit Court of Appeals, Tenth Circuit. The fund represents the difference between the old stipulated rate charged for natural gas by Cities Service Gas Company and collected from the distributors, City of Springfield and its Board of Public Utilities, and their predecessor, Springfield Gas and Electric Company, and the new rate determined by the Federal Power Commission to be a rate affording Cities Service a fair and reasonable return. *Cities Service Gas Company v. Federal Power Commission, 10 Cir., 155 F. 2d 694.* Defendants by answer prayed for a judgment declaring that neither plaintiffs nor any ultimate gas consumers have any right, title or interest in [***14] or to the impounded fund. The trial court rendered a judgment declaring that the Board of Public Utilities of the City of Springfield is entitled to $ 154,822.77 of the impounded fund, and that the ultimate domestic and commercial consumers of natural gas at Springfield are entitled to $ 648,543.60, a $ 30,000 attorney fee to be paid to plaintiffs' counsel from [**350] the amount which the trial court declared should be awarded to the ultimate consumers. Plaintiffs did not appeal. Defendants have perfected this appeal.

[*665] The case was tried upon stipulated facts. The stipulation of facts and appended exhibits comprise many pages. We will try to set out in the course of this opinion the facts material to our review of the cause; however, for a more extensive examination of the historical background of the instant litigation, reference may be made to Cities Service Gas Company v. Federal Power Commission, supra, as reported in *155 F. 2d 694,* and in *176 F. 2d 548.*

Springfield Gas and Electric Company was incorporated in 1927 and, until March 26, 1945, that company operated utility properties in Springfield, including a natural gas distribution system. Springfield [***15] Gas and Electric Company, paying a stipulated rate, purchased its natural gas for resale to local consumers in intrastate commerce from Cities Service Gas Company, an interstate wholesaler of natural gas. Since the enactment of the Natural Gas Act of 1938, *15 U.S.C.A. § 717,* the Federal Power Commission has had jurisdiction over rates to be charged for natural gas supplied in interstate commerce. Springfield Gas and Electric Company resold the natural gas, so purchased from Cities Service Gas Company, to the ultimate consumers of natural gas at Springfield in intrastate commerce at rates approved by the Public Service Commission of Missouri, which Commission had jurisdiction to determine rates to be charged by the Springfield Gas and Electric Company for gas sold to the ultimate consumers in intrastate commerce.

March 26, 1945, all of the properties of Springfield Gas and Electric Company were conveyed to defendant City of Springfield including "all rights which the Springfield Company might have had, but for the aforesaid conveyance to the City, to collect and receive that portion of the funds impounded in the United States Circuit Court of Appeals for the Tenth Circuit which [***16] accrued by reason of excessive rates by Cities Service for gas furnished at wholesale to the Springfield Company prior to March 26, 1945." After City's acquisition of the utility properties, City continued to pay Cities Service for natural gas at the rate theretofore paid by Springfield Gas and Electric Company until a new contract was entered into June 28, 1947, effective as of April 23, 1947, between Cities Service and City's Board of Utilities, which contract stipulated rates approved by the Federal Power Commission.

July 28, 1943, the Federal Power Commission had entered an order effective September 1, 1943, directing Cities Service Gas Company to reduce its rates in connection with its sale of natural gas in interstate commerce to many local distributors in Kansas, Nebraska, Oklahoma and Missouri, including the local distributor, Springfield Gas and Electric Company. Cities Service instituted an action in the United States Court of Appeals for the Tenth Circuit to review the Federal Power Commission's rate-

reduction order; and, upon request of Cities Service, a stay of the Federal Power Commission's [*666] order, pending the determination of the action, was granted conditionally [***17] upon the monthly payments by Cities Service into a designated depository in amounts representing the difference between the old rate and the new rate ordered by the Commission. The stay order further provided that, "upon the final determination of this proceeding on review, such moneys (the impounded funds) shall be paid out in such manner and in such amounts as this court by further order shall direct, to the persons finally adjudged in this review proceeding to be entitled thereto and in accordance with the final adjudication with respect to the Commission's order."

Upon review, the order of the Federal Power Commission of July 28, 1943, was affirmed by the *United States Circuit Court of Appeals (155 F. 2d 694).* November 12, 1946, the petition of Cities Service to the Supreme Court of the United States for certiorari was denied *(329 U.S. 773, 67 S. Ct. 191);* and January 6, 1947, a rehearing was denied by the *Supreme Court of the United States (329 U.S. 832, 67 S. Ct. 489).*

[**351] March 26, 1947, Cities Service filed a new schedule of rates pursuant to the affirmed order of the Federal Power Commission, which schedule, as amended, was accepted by the Federal Power Commission [***18] May 2, 1947.

August 4, 1947, a Master, appointed by the United States Circuit Court of Appeals, filed a plan for distribution of the impounded fund. The Master's plan was approved and a number of claims, including a claim of City Utilities of Springfield, were heard and determined. Concerning the Springfield claim, an order was entered as of August 19, 1947, as follows, "The claims of the City Utilities of the city of Springfield, Missouri, and * * * hereby are granted, the amounts of refunds allocable to the respective 'city-gate' of each of such cities hereafter shall be fixed by order of Court." (The granting of the claim of City Utilities of Springfield was not an adjudication that the ultimate consumers of Springfield were not entitled to receive the funds in controversy.) Subsequently, it was determined that the excess charges, allocable to the city gate at Springfield, over and above the rates as reduced by the Federal Power Commission's order of July 28, 1943, on purchases by the Springfield Gas and Electric Company amounted to $ 290,451.91, and on purchases by the municipal utilities of Springfield, $ 512,914.46, a total of $ 803,366.37. The Master's approved plan also [***19] made any refund to eligible customers of distributors conditional upon "a satisfactory written disclaimer" to be filed in the cause by the distributor. No such disclaimer has been filed by Springfield Gas and Electric Company, or by City of Springfield or its Board of Public Utilities.

September 30, 1947, after the order verifying the amount due for excess charges, the plaintiffs instituted the instant action. However, the Supreme Court of the United States granted the writ of certiorari [*667] in the case of Federal Power Commission v. Interstate Natural Gas Company, and further proceedings in the instant case were suspended pending the opinion of the Supreme Court in the Interstate Natural Gas Company case, which case was decided April 18, 1949. *336 U.S. 577, 69 S. Ct. 775.* After the decision in the Interstate Natural Gas Company case, plaintiffs herein filed a motion in the United States Circuit Court of Appeals for permission to intervene in the case of Cities Service Gas Company v. Federal Power Commission, supra. Movants also filed an intervening petition, and a motion for summary judgment on the pleadings. The movants-petitioners contended it was the duty of the [***20] Circuit Court of Appeals to determine the ultimate ownership of the impounded fund and to make distribution thereof. The petition for intervention was denied, the Circuit Court of Appeals holding that the fund as allocable to Springfield should remain with the Circuit Court of Appeals "to be ultimately distributed by it in accordance with the judgment of the state court." *Cities Service Gas Company v. Federal Power Commission, supra, 176 F. 2d 548, at page 553.*

Plaintiffs-respondents are right in saying that the Congressional objective in passing the Natural Gas Act was to benefit ultimate consumers by requiring a reduction in excessive rates charged in interstate transportation or sales to distributors. We can here say the Federal Power Commission's rate-reduction order of July 28, 1943, has been of tremendous benefit to the ultimate consumers of natural gas in Missouri. [As an example, effective June 16, 1947, less than six months after the Supreme Court of the United States had denied a rehearing in the case of *Cities Service Gas Company v. Federal Power Commission (329 U.S. 832, 67 S. Ct. 489),* the City Council of Springfield approved a schedule of rates to consumers of gas, [***21] which schedule effected a reduction of approximately $ 100,000 a year in gross revenue.] Respondents are mistaken, however, in saying that the "overall rate" (as respondents term the rate prescribed by the Public Service Commission of Missouri to be charged by the utility at Springfield in serving its customers, the local ultimate consumers at Springfield) was on July 28, 1943, modified and reduced by the order of the Federal Power Commission. The Natural Gas Act was so framed and enacted as to complement and in no manner usurp [**352] state regulatory authority. It is clear the Act limited the jurisdiction of the Federal

Power Commission to that segment of the industry engaged in interstate commerce and that the Federal Power Commission is without jurisdiction to regulate local intrastate rates or order a reduction thereof in order to give the ultimate consumers the benefit of any rate reduction ordered by such Commission in rates between interstate wholesalers and local intrastate distributors of natural gas. *Federal Power Commission v. Interstate Natural Gas Company, supra; Central States Electric Co. v. City of Muscatine, [*668] 324 U.S. 138, 65 S. Ct. 565; Federal [***22] Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 64 S. Ct. 281; Public Utilities Commission v. United Fuel Gas Co., 317 U.S. 456, 63 S. Ct. 369; Cities Service Gas Company v. Federal Power Commission, supra, 176 F. 2d 548.*

In *Federal Power Commission v. Interstate Natural Gas Company, supra,* a case greatly relied upon by respondents, the distributors who sought return of the fund created from their payments of excessive rates were subject to the jurisdiction of the Federal Power Commission and their claims to the fund were solely determinable by federal law, since they were natural gas companies engaged in transportation or sale at wholesale of natural gas in interstate commerce. In the instant case the local distributors, appellants, who seek the return of the fund created from their payments of excessive rates, were and are engaged in the sale of natural gas in intrastate commerce. They were and are subject to the jurisdiction of state regulatory bodies with respect to the distributors' relations with their customers, and their claims to the fund in controversy are determinable by state law as were the local distributors and their claims in the case of *Central States Electric [***23] Co. v. City of Muscatine, supra.*

The United States Circuit Court of Appeals has announced it will make distribution of the impounded fund, allocated to Springfield, being guided by the underlying principle of unjust enrichment. Cities Service Gas Company v. Federal Power Commission, supra. In this connection that Court said.

"Giving the distributing companies these impounded funds, if lawfully they would have been compelled to pass them on to the ultimate consumers in reduced rates had we not interfered with the enforcement of the Commission's order, would constitute unjust enrichment. On the other hand, giving to the ultimate consumers of Springfield a part of these funds, if they would not have been entitled by law to a reduction in rates had we not interfered with the enforcement of the order, would constitute a windfall to them and would likewise constitute unjust enrichment. In other words, equity requires that we place all parties as nearly as possible where they would have been had we not stayed the Commission's order. Where the ultimate consumers would have been in this case with respect to their municipally owned gas company had the Commission's order not been [***24] suspended depends upon state law. It depends upon whether the rates charged to Springfield consumers are subject to regulation and upon whether there is state authority which could have compelled a readjustment of the local rate so as to pass on to the ultimate consumers the benefit of the new rate established by the Commission." *176 F. 2d 548, at page 552.*

[*669] In our state the legislative function of fixing just and reasonable rates of privately owned public utilities is vested in the Public Service Commission of Missouri by our Public Service Commission Law. See Chapter 35, R.S. 1939, particularly Sections 5592, 5645, 5646, 5647 and 5690, Mo. R.S.A. Chap. 35, §§ 5592, 5645, 5646, 5647 and 5690. The Public Service Commission has no power to declare or enforce any principle of law or equity. The ultimate return to the utility as a result of the rate fixed and subsequently charged and collected will necessarily vary from time to time. "The law, of course, did not require that the rates at any time yield any particular return." *State ex rel. Capital City Water Co. v. Public Service Commission, 298 Mo. 524, 252 S.W. 446.* Where the utility is municipally owned, the [***25] legislative function of fixing rates is in the municipality to be in no way affected by any [**353] regulation "except the will of its own citizens." *Missouri Power & Light Co. v. City of Pattonsburg, 343 Mo. 1128, 125 S.W. 2d 20;* State ex rel. *City of Sikeston v. Public Service Commission, 336 Mo. 985, 82 S.W. 2d 105.* Generally the appropriate legislative officers of the municipality fix the rates and change them from time to time as the operation of the utility may require. The Board of Public Utilities of the City of Springfield presently has the power to fix rates subject to the approval of the City Council. Laws of Missouri 1945, p. 1272, Mo. R.S.A. § 6610.6. After the City of Springfield acquired the Springfield utilities, the City Council fixed the rates until the creation of City's Board of Public Utilities, April 1, 1946.

The cost of some commodity (for example, natural gas) essential to the operation of a utility may vary and for some reason become less than the cost at the time the rates to consumers are fixed or approved by the Public Service Commission (or other regulatory authorities, such as a city, or a city's board of public utilities) in the exericse of [***26] its rate-making powers in the utility's intrastate sales of natural gas in Missouri. The Commission (or other regulatory authority) in the exercise of its rate-making powers may modify or change the rate to consumers, the Commission having in mind

such reduced operation cost and other ever-changing operation costs and the ever-changing rate base to be considered in fixing rates. In this manner the Commission may in some measure pass on to the ultimate consumers the benefit of the utility's reduced operating costs. The Commission fixes rates prospectively and not retroactively. Our courts do not fix rates. Our courts may only review, and affirm or set aside or reverse and remand the Commission's rate-fixing orders. Our courts cannot make the Commission do retroactively and our courts cannot retroactively do that which the Commission, or other rate-making body, only does prospectively. And we believe we cannot determine the ownership of the funds in controversy upon a basis of an investigation of what a regulatory authority might have done but [*670] for the stay of the Federal Power Commission's order. This is because, as we understand it, property rights devolve upon effective [***27] lawful rate-fixing orders. *Straube v. Bowling Green Gas Co., 360 Mo. 132, 227 S.W. 2d 666.*

(By Public Service Commission's Supplemental Report and Order of April 24, 1944, the gross operating revenue of Springfield Gas and Electric Company's "Gas Department" was reduced by $ 31,000 for the year 1944, and, by the Commission's Supplemental Report and Order of May 7, 1945, the gross operating revenue of the Gas Department of the Company was reduced in an amount computed at the rate of $ 3000 per month for the year 1945. The City Council of Springfield by ordinance, effective April 1, 1946, determined new and reduced rates to domestic and commercial consumers at Springfield. We cannot say the orders and ordinance were promulgated or enacted in any contemplation of the reduction of interstate rates as ordered by the Federal Power Commission.)

It is true, as respondents urge, that the monthly payments by Cities Service into the depository designated by the United States Circuit Court of Appeals were, in a sense, conditional upon that Court's action in the review of the order of the Federal Power Commission. But the money paid into the impounded fund by Cities Service had been paid [***28] to Cities Service by the Springfield utility out of its own funds. Respondents, ultimate consumers of gas at Springfield, were not making conditional payments for the gas furnished them by the Springfield Gas and Electric Company and by the City Utilities of Springfield in accordance with the effective rates approved by the Public Service Commission and by the City Council and the Board of Public Utilities of Springfield.

No ultimate consumer had ever made a request or a demand that any of the money collected by the utility from its customers at Springfield in accordance with rate schedules in force and effect as approved by the Public Service Commission, or as fixed by the City Council of Springfield or by City's Board of Public Utilities, should be ordered set apart, segregated or [**354] impounded to await the event of the decision upon the review of the Federal Power Commission's order. And neither the Public Service Commission nor City Council of Springfield or Springfield's Board of Public Utilities has made such an order. The money collected by the utility at Springfield came into its hands unconditionally. There is no allegation, stipulated fact or contention tending [***29] to support any inference of any taint of fraud in the action or in the procurance of the action of the rate regulatory authorities in establishing or approving the rates charged. We think it could not be soundly said there was anything wrongful in the collection of money by the Springfield utility pursuant to the rates as effectuated by the respective rate-making [*671] authorities of Missouri. Respondents were paying to the local utility that to which it was lawfully entitled.

We are of the opinion that Springfield Gas and Electric Company, and defendants-appellants, City and Board of Public Utilities of Springfield, lawfully and unconditionally came into the possession, custody and control of the moneys paid by respondents for gas furnished them in intrastate commerce pursuant to lawful rates fixed by rate-making authorities of Missouri. There was no encroachment upon the rights of respondents. They have paid no more than the rates lawfully in effect. In our opinion the money so unconditionally paid as prescribed by the lawfully promulgated and effective rates became and was the property of the distributors, appellants. We cannot ignore our regulatory laws, and we will [***30] give effect to constitutional provisions as we understand them. We have said that when the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or court action without violating the due process provisions of the state and federal constitutions. *Straube v. Bowling Green Gas Co., supra.*

It is our view that, if the impounded fund in controversy or a part thereof were paid over to respondents, it would "constitute a windfall to them and would likewise constitute unjust enrichment."

The judgment should be reversed and the cause remanded with directions to enter a declaratory judgment in harmony with this opinion.

It is so ordered. Lozier and Aschemeyer, CC., concur.

PER CURIAM: -- The foregoing opinion by Van Osdol, C., is adopted as the opinion of the court. All the judges concur.

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984 S.W.2d 113 printed in FULL format.

NORTH KANSAS CITY HOSPITAL BOARD OF TRUSTEES, Respondent, v. ST. LUKE'S NORTHLAND HOSPITAL, Appellant.

WD 54167

COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

984 S.W.2d 113; 1998 Mo. App. LEXIS 1957

November 3, 1998, Opinion Filed

SUBSEQUENT HISTORY: [**1] As Corrected December 17, 1998. Respondent's Motion For Rehearing & (Or) Transfer to Supreme Court Denied, December 22, 1998. Released for Publication February 26, 1999.

PRIOR HISTORY: APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY. Honorable David W. Russell, Judge.

DISPOSITION: REVERSED and REMANDED.

CORE TERMS: entity, governmental body, Sunshine Law, disclosure, governmental bodies, public records, trade secrets, separate entity, monopolize, Sherman Act, pricing, acquisition, conspiracy, quasi-public, analyses, minutes, custodian, monopoly, antitrust, governmental entities, right to privacy, sub-market, inspection, privacy, lease, bid, affiliated, funding, exempt, Missouri Trade Secrets Act

COUNSEL: Allan V. Hallquist, Peter Sloan, David L. Rein, Jr. Kansas City, Missouri, Blackwell Sanders Matheny Weary & Lombardi, for appellants.

William E. Quirk, Shughart Thomson & Kilroy, Kansas City, Missouri, W. James Foland, Foland & Wickens, Kansas City, Missouri, for respondents.

JUDGES: Before Ellis, P.J., Lowenstein and Riederer, JJ., Presiding Judge All concur.

OPINIONBY: JOSEPH M. ELLIS

OPINION: [*115]

On July 31, 1996, James M. Brophy, president and chief executive officer of St. Luke's Northland Hospital, sent a letter to the North Kansas City Hospital Board of Trustees making 24 different requests for documents under Missouri's Sunshine Law §§ 610.010 to 610.032. n1 The specific information requested is reflected in Appendix A at the end of this opinion. Generally, the requested documents related to (1) the Board of Trustee's involvement in a condemnation proceeding between St. Luke's and the city of Smithville over St. Luke's Smithville campus and (2) the general operation of North Kansas City Hospital and "related entities."

n1 All statutory references are to RSMo 1994 unless otherwise noted.

[**2]

On August 6, 1996, Michael E. Payne, President of NKC Hospital, as custodian of all hospital records, sent St. Luke's a letter granting access to some of the requested documents but denying a majority of the requests. The substantive contents of that letter appear in Appendix B at the end of this opinion. The letter generally asserted that access to the records was denied pursuant to § 610.010 et. seq. On August 7, 1996, the Board of Trustees filed an action in the Circuit Court of Clay County requesting a declaratory judgment validating its refusal of access to St. Luke's. Specifically, the Board asked the court to find (1) that NKC Hospital itself was not a "public governmental body;" (2) that certain requested records were not "public records;" and (3) that the actions of the Board in closing the records were proper. The Board also requested an award of attorneys' fees and any other relief that the court deemed just and proper.

The trial court heard the cause on January 16, 1997. At that time, the Board delivered the requested documents to the court for in camera review. At some point prior to the entry of judgment, the Board provided St. Luke's with access to further [**3] documents relating to the Smithville campus in response to certain requests. On February 21, 1997, the trial court

entered a declaratory judgment in favor of the Board. The court found: (1) The Board and NKC Hospital are distinct entities and that NKC Hospital is not a public governmental agency. Accordingly, [*116] the court found that those documents which are records of NKC Hospital, not the Board, are not public records; (2) Meritas Health Corporation and any other "related entities" are not quasi-public governmental entities under the Sunshine Law. Accordingly, the Trustees did not have to reveal any documents, contracts, or agreements with any related entity, including but not limited to Meritas and Creekwood Ambulatory Surgery Center; (3) Many of the records requested by St. Luke's were properly closed because they were protected from disclosure by law under Missouri and U.S. antitrust statutes, the Missouri Trade Secrets Act, common law relating to trade secrets and the Constitutional right to privacy. Based on these findings, the trial court held that the Board had fully complied with the provisions of the Sunshine Law.

In its first point, St. Luke's claims the trial court erred [**4] in finding that NKC Hospital was not a "public governmental body" and that the documents retained by the hospital were therefore not "public records." While conceding that it is itself a public governmental body, the Board of Trustees maintains that the hospital is a separate entity, that the operation of a hospital is not governmental, and that the hospital's records are not subject to the provisions of the Sunshine Law.

The trial court accepted the Board's arguments, expressly finding that the Trustees do not control the day-to-day operation of NKC Hospital, hire physicians or nurses, enter into managed care contracts, hire consultants, or take care of sick people. The court found that these were things that NKC Hospital does as a separate entity in day-to-day operation of the hospital. The court found that the documents related to the day-to-day operation of the hospital do not "rise to the level" of the Board of Trustees, and were therefore not "retained by or of" the Board of Trustees. The trial court found that North Kansas City Hospital was a separate entity from the Board of Trustees that does not "govern" anyone or anything, does not operate as a legislative or administrative [**5] governmental body, and is not deliberative in nature. The court found that the hospital does not have rule-making power and it is not quasi-judicial. Based on these findings, the trial court concluded that North Kansas City Hospital was not a "public governmental body" and its records were not subject to the Sunshine Law.

Both the trial court and the Board rely heavily on *Tribune Publishing Co. v. Curators of the Univ. of Missouri, 661 S.W.2d 575 (Mo. App. W.D. 1983)*, for the proposition that the governing board of an institution and the institution itself are separate entities and that the institution itself is not a public governmental body. Their reliance is misplaced. Tribune is readily distinguishable. Tribune held that the Board of Curators of the University of Missouri is sui generis and by the mandate found in Article IX, § 9(a) of the Missouri Constitution, is a separate entity from the university itself. *Id. at 579*. The constitutional mandate significantly differentiated the Board of Curators from a normal corporate board of directors. Id. No such constitutional mandate comes into play with regard to the Board of Trustees [**6] of North Kansas City Hospital. Furthermore, in determining that the university itself was not a public governmental body, the Tribune court construed a definition of "public governmental body" from an earlier version of the Sunshine Law which did not encompass administrative governmental entities. *Tipton v. Barton, 747 S.W.2d 325, 329 (Mo. App. E.D. 1988)*. Since Tribune, the Legislature has amended the Sunshine Law to, among other things, expand the definition of "public governmental body" to specifically include administrative or executive bodies. Id.

Section 610.010(4) currently provides that a "public governmental body" is:

> Any legislative, administrative or governmental entity created by the constitution or statutes of this state, by order or ordinance of any political subdivision or district, judicial entities when operating in an administrative capacity, or by executive order, including . . . any department or division of the state, of any political subdivision of the state, of any county or of any municipal government, school district or special purpose district including but not limited to sewer districts, water districts, [*117] and [**7] other subdivisions of any political subdivision.

The city of North Kansas City is clearly a public governmental body within the provisions of § 610.010(4), and the Board of Trustees readily concedes that it is itself a public governmental body. However, the Board contends, and the trial court agreed, that the hospital is a separate entity that has an existence of its own and is not a public governmental body. We disagree. It is conceded that NKC Hospital is a Chapter 96 hospital. As such, it is not a separate entity from its creator city. *Younger v. Missouri Pub. Entity Risk, 957 S.W.2d 332, 338 (Mo. App. W.D. 1997)* (citing *State ex rel. Bd. of Trustees of North Kansas City Mem'l Hosp. v. Russell, 843 S.W.2d 353, 357* (Mo. banc 1992)). The city's operation of a municipal hospital is a governmental function just like any other action of the city and there is no reason to distinguish a city hospital as a separate entity from the

city. *957 S.W.2d at 337-38* (citing *Zummo v. Kansas City, 285 Mo. 222, 225 S.W. 934, 937 (Mo. 1920)*).

The Board of Trustees is merely a part of the city government (just like the mayor, the city council, zoning commissions, [**8] boards of adjustment, park boards, and boards created to operate municipally owned utilities) created by statute to provide the city with a means of operating its hospital. *Russell, 843 S.W.2d at 357.* n2 The Board has the authority to operate, maintain and manage a hospital; to make and enter into contracts, for the use, operation or management of the hospital; to make and enter into leases of equipment and real property; and to provide rules and regulations for the operation, management or use of the hospital. § 96.150.5. The employees of the hospital are city employees. *Younger, 957 S.W.2d at 338.* To the extent the Board of Trustees does not conduct the "day-to-day operations" of the hospital, that function is performed by a city employee who has been granted the authority to do so by the Board.

n2 The nature of the Board of Trustees of North Kansas City Hospital was thoroughly discussed in *Russell, 843 S.W.2d at 355-56.* The Supreme Court concluded that the Board of Trustees was not a separate entity from the city and was merely a part of the city government just like the mayor, the city council, zoning commissions, boards of adjustment, park boards, and boards created to operate municipally owned utilities. *Russell, 843 S.W.2d at 357.*

[**9]

A "public record" under the Sunshine Law is any record retained by any public governmental body. *City of Springfield v. Events Publishing, 951 S.W.2d 366, 371 (Mo. App. S.D. 1997).* "The emphasis is not on the nature of the document, but on who prepared or retains the record." Id.

The Board operates the hospital for the city. *Russell, 843 S.W.2d at 357.* The Board appointed the President of NKC Hospital, a city employee, to be the custodian of the hospital's records. n3 Therefore, the President, the Board of Trustees and the city all have legal control over the hospital records. *Tipton, 747 S.W.2d at 329.* Accordingly, the records are "retained" by a public governmental body. n4 Id. As a result, the records of North Kansas City Hospital are public records under the Sunshine Law.

n3 The Board of Trustees provided by resolution, "Whereas, Section 610.023.1, R.S.Mo., provides that a public governmental body is to appoint a custodian who is to be responsible for the maintenance of that body's records and the identity and location of the custodian is to be made available upon request. . . Now, therefore, be it resolved: That the President of North Kansas City Hospital be and hereby is appointed custodian of the records of North Kansas City Hospital . . ."

[**10]

n4 Consequently, even if the hospital were a separate entity from the Board of Trustees, since the documents in question are "retained by" the Board of Trustees, they qualify as "public records" under the Sunshine Law. § 610.010.6.

St. Luke's next challenges the trial court's determination that Meritas Health Corporation ("Meritas") is not a quasi-public governmental body subject to the Sunshine Law. Meritas was incorporated in January, 1993 under Chapter 355, the Missouri General Not For Profit Corporation Law. Meritas is wholly owned by the Board of Trustees. Meritas purchases physician groups, participates as a member in a managed care provider, and operates medical office facilities. Its articles of incorporation provide that it "shall be operated exclusively for the benefit of, to perform the functions of, and to carry out the [*118] purposes of the Board of Trustees of North Kansas City Hospital." Under its bylaws, Meritas' nine member board of directors is to contain the Chairman, Vice Chairman, Secretary, and Treasurer of the North Kansas City Hospital Board of Trustees; the President [**11] of North Kansas City Hospital; the Vice-President of Finance of North Kansas City Hospital; and three more members elected yearly by the board of directors. Article XIII of the articles of incorporation provides that in the event of the dissolution of the corporation, all of the assets of the corporation shall be distributed to North Kansas City Hospital, or to the city of North Kansas City in the event that North Kansas City Hospital no longer exists. Meritas is headquartered at the hospital and its board of directors meets at the hospital. Meritas has occasionally entered into loan agreements with the Board of Trustees.

Section 610.010(4) provides that any quasi-public governmental body is considered a public governmental body for the purposes of the Sunshine Law. That section defines "quasi-public governmental body" as "any person, corporation or partnership organized or authorized to do business in this state under the provisions of chapter 352, 353, or 355, RSMo, or unincorporated association which . . . has as its primary purpose to enter into contracts with public governmental bodies, or

to engage primarily in activities carried out pursuant to an agreement or agreements [**12] with public governmental bodies." § 610.010(4)(f).

The trial court expressly found that Meritas did not have as its primary purpose entering into contracts with public governmental bodies. However, the trial court failed to address whether Meritas had as its primary purpose to engage primarily in activities carried out pursuant to an agreement with a public governmental body. Article VIII of Meritas' articles of incorporation provides that Meritas "shall be operated exclusively for the benefit of, to perform the functions of, and to carry out the purposes of the Board of Trustees of North Kansas City Hospital." This provision evidences an "agreement" such as is contemplated by the statute, particularly in light of the fact that Meritas was incorporated, and is wholly owned, by the Board of Trustees, and its Board of Directors is dominated and controlled by the Board of Trustees. It clearly demonstrates that Meritas is "engaged primarily in activities carried out pursuant to an agreement" with the Board of Trustees, and consequently the city, both, as we have previously found, "public governmental bodies." Accordingly, we can only conclude that Meritas is a quasi-public governmental [**13] body under § 610.010(4)(f). See *Champ v. Poelker, 755 S.W.2d 383, 391 (Mo. App. E.D. 1988)* (holding contract between a corporation and St. Louis County providing that the corporation would promote tourism and convention business in the county was sufficient evidence to infer that the corporation's business was to perform a public function pursuant to agreements with governmental bodies and consequently sufficient to find the corporation was a quasi-public governmental body); See also *Sarasota Herald-Tribune v. Community Health Corp., 582 So. 2d 730, 734 (Fla. Dist. Ct. App. 1991)* (holding non-profit corporation similar to Meritas, which was created to further the interests of a public hospital, was subject to Florida's public records act). To hold otherwise would allow governmental bodies to delegate or "contract away" their duties or functions in order to avoid disclosure of what would otherwise be public records. *KMEG Television, Inc. v. Iowa State Bd. of Regents, 440 N.W.2d 382, 385 (Iowa 1989).*

In its next point, St. Luke's claims the trial court erred in finding that certain records were properly closed under § 610.021. The trial court found that [**14] many of the records requested by St. Luke's had been properly closed because they were protected by law from disclosure under Missouri and United States anti-trust statutes, the Missouri Trade Secrets Act, common law relating to trade secrets, and the Constitutional right to privacy. n5

n5 The trial court also found that the litigation and real estate exceptions were appropriately applied to close certain requested records. While St. Luke's challenged the trial court's rulings relating to the litigation and real estate exceptions in its original brief, the Board of Trustees' response indicated that the requested documents to which these exceptions would have applied had already been provided to St. Luke's. Both parties agree that these arguments are rendered moot.

[*119]

Except as otherwise provided by law, all public records of public governmental bodies are to be open to the public for inspection and copying. § 610.011(2). "Chapter 610 embodies Missouri's commitment to open government and is to be construed [**15] liberally in favor of open government." *Missouri Protection & Advocacy Svcs. v. Allan, 787 S.W.2d 291, 295 (Mo. App. W.D. 1990).* Section 610.021 authorizes public governmental bodies to close public records under certain situations. § 610.021. These exceptions to the Sunshine Law are to be strictly construed to promote the public policy of the state that meetings, records, votes, actions, and deliberations of public governmental bodies are to be open to the public. § 610.011(1). "Hence, public records must be presumed open to public inspection unless they contain information which clearly fits within one of the exemptions set out in § 610.021." *State ex rel. Missouri Local Gov't Retirement Sys. v. Bill, 935 S.W.2d 659, 664 (Mo. App. W.D. 1996).* n6

n6 "If a public record contains material which is not exempt from disclosure as well as material which is exempt from disclosure, the public governmental body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." § 610.024.1.

[**16]

The trial court relied on § 610.021(14) which allows a public governmental body to close "records which are protected from disclosure by law." § 610.021(14). The trial court found that many of the records requested by St. Luke's had been properly closed because they were protected by law from disclosure under Missouri and United States anti-trust statutes, the Missouri Trade Secrets Act, common law relating to trade secrets, and the Constitutional right to privacy.

The first documents which the trial court found were protected by law were records requested by St. Luke's

containing pricing information, the disclosure of which the trial court found would violate both § 416.031.2 of Missouri's antitrust law and *15 U.S.C. §§ 1* and 2 of the Sherman Act. Accordingly, the court held that St. Luke's was barred from obtaining pricing information for NKC Hospital's services, the acquisition price of physician practices, the compensation packages of physician employees, the strategic plan of the hospital, the monthly financial statements, consultant information, insurance agreements, managed care contracts, or any other commercially sensitive information which could influence [**17] the quality or price of medical services to the consumer.

Even assuming, arguendo, that the applicable antitrust statutes can provide protection to documents by way of § 610.021(14), the record does not support a finding that those statutes are invoked by the facts at bar. Chapter 1 of the Sherman Antitrust Act makes illegal "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *Wine & Spirits Specialty, Inc. v. Daniel, 666 S.W.2d 416, 417* (Mo. banc 1984) (quoting *15 U.S.C. § 1* (1976)). "A party alleging a violation of *15 U.S.C. § 1* must allege that (1) defendants contracted, combined or conspired among each other; (2) the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets; (3) the objects of and the conduct pursuant to the contract or conspiracy were illegal; and (4) plaintiff was injured as a proximate result of the conspiracy." *Johnston v. Norrell Health Care, Inc., 835 S.W.2d 565, 568 (Mo. App. E.D. 1992)* (citing *Defino v. Civic Ctr. Co., 718 S.W.2d 505, 509 (Mo. App. E.D. 1986))*. In order to [**18] show an "agreement, combination or conspiracy in restraint of trade," a party must show either collaboration among competitors (horizontal restraint) or some combination in the "line of distribution" that restrained competition (vertical restraint). *Marc's Restaurant, Inc. v. CBS, Inc., 730 S.W.2d 582, 586 (Mo. App. E.D. 1987)* (citing *Nat'l Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81, 87* (D.D.C.), aff'd, *595 F.2d 888 (D.C. Cir. 1979))*. In interpreting Chapter 1 of the Sherman Act, the United States Supreme Court has held: [*120]

The distinction between unilateral and concerted action is critical here. Adhering to the language of § 1, this Court has always limited the reach of that provision to "unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy between separate entities.'" *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984))* (emphasis in original). We have therefore deemed it "of considerable importance" that independent activity by a single entity be distinguished from a concerted effort by more than one entity to fix prices or otherwise restrain [**19] trade. *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement. *Monsanto Co., 465 U.S. at 760-761; United States v. Parke, Davis & Co., 362 U.S. 29, 44, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*.

*Fisher v. City of Berkeley, 475 U.S. 260, 266, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986)*. "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization [under *15 U.S.C. § 2]." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*. "Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." Id.

The Board of Trustees fails to identify how St. Luke's is acting in concert with anyone else in requesting information under the Sunshine Law. St. Luke's unilateral actions cannot run afoul of Chapter 1 of the Sherman Act. Id. Thus, the requested [**20] documents were not protected by *15 U.S.C. § 1*.

The trial court also concluded that the requested documents containing pricing information were protected from disclosure by the monopoly provisions found in § 416.031(2), RSMo. and Chapter 2 of the Sherman Act. Section 416.031(2) provides that "it is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state." § 416.031(2). Chapter 2 is the analogous provision of the Sherman Act which makes it an offense to monopolize, attempt to monopolize, or conspire to monopolize any part of the trade or commerce among the several States. *15 U.S.C. § 2* (1976). Section 416.141 provides that Missouri's antitrust provision "shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." § 416.141. Accordingly, we will examine the potential violation of the monopoly provisions in § 416.031(2) and *15 U.S.C. § 2* at the same time.

While the trial court concluded that St. Luke's acquisition of the requested information would violate both § 416.031(2) and *15 U.S.C. § 2*, it fails to explain how it reached that decision. "The offense of [**21] monopoly under § 2 has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a conse-

quence of a superior product, business acumen or historic accident." *Metts v. Clark Oil & Ref. Corp., 618 S.W.2d 698, 703 (Mo. App. E.D. 1981)* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)).* The trial court found that St. Luke's controlled 20% of the relevant sub-market. St. Luke's clearly does not have a monopoly over the sub-market. See *Blue Cross & Blue Shield v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995)* ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share.") (citing *United States v. Rockford Memorial Corp., 898 F.2d 1278, 1285 (7th Cir. 1990)); Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 201-02 (3d Cir. 1992); Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 694 n. 18 (10th Cir. 1989);* and *United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. [**22] 1945)).*

The Board of Trustees argues, and apparently the trial court agreed, that St. Luke's was attempting to monopolize the sub-market when it requested the documents containing pricing information. This conclusion is not supported by the record. A party "may not be liable for attempted monopoly under [*121] § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize." *Spectrum Sports, 506 U.S. at 459.* The trial court made no finding with regard to the likelihood of actual monopolization and the findings that were rendered do not support such a conclusion. The trial court merely found that, if St. Luke's obtained the requested documents, it would use the pricing information to compete against NKC Hospital and that there was a substantial likelihood that this use would "affect the price of medical services to the consumers in the relevant market." The trial court made no finding relating to how the possible change in St. Luke's pricing might affect its market share. The finding made by the trial court does not equate to a finding that a dangerous probability exists that St. Luke's will monopolize [**23] the market if it obtains the requested information. Moreover, such cannot be inferred because St. Luke's only controls 20% of the relevant sub-market, while NKC Hospital currently has a 30-35% share. The requested documents containing pricing information were not protected from disclosure by the provisions of § 416.031(2) or Chapter 2 of the Sherman Act.

The trial court also found that many of the documents requested by St. Luke's were protected by the Missouri Uniform Trade Secrets Act, §§ 417.450 et seq. RSMo (Cum. Supp. 1995). The court found that "revelation of the records will violate the Trustees/NKC Hospital's right of commercial privacy by allowing the disclosure of trade secrets through an unfair means."

While the documents certainly contain "trade secrets" as defined in § 417.453, the Trade Secrets Act protects only those trade secrets that are "misappropriated." Misappropriation occurs when a trade secret is acquired through "improper means." § 417.453(2). The act provides that "'improper means' includes theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means." § [**24] 417.453(1). Filing a request for a document under the Sunshine Law is simply not an "improper means" within the provisions of the Trade Secrets Act. Accordingly, the statutory provisions of the trade secrets act do not provide protection for the requested records. n7 The Trade Secrets Act does not afford protection for the requested documents.

n7 Certainly, the Board of Trustees has valid commercial reasons for wishing to keep the information contained in the requested documents from the hands of a competitor of NKC Hospital. *State ex rel. Blue Cross & Blue Shield v. Anderson, 897 S.W.2d 167, 170-71 (Mo. App. S.D. 1995).* While the protection of trade secrets perhaps should be an exception to the Sunshine Law, § 610.021 currently contains no such provision.

The trial court next found that "the contracts that the Trustees and/or NKC Hospital have entered into with third persons, such as insurers, physician groups, etc., are records in which those third persons have a privacy interest" and that those [**25] privacy interests were protected under the right of privacy found in the Missouri Constitution. In other words, the trial court found that private individuals and commercial entities have a right of privacy arising out of the Missouri Constitution which prevents the disclosure of their contracts with a public governmental entities.

"Neither the federal nor the Missouri constitutions expressly provide a right of privacy." *Cruzan by Cruzan v. Harmon, 760 S.W.2d 408, 417* (Mo. banc 1988). "The status of the notion of a constitutional right of privacy 'still remains largely undefined.'" *City of Springfield, 951 S.W.2d at 372 n.3* (quoting *Whalen v. Roe, 429 U.S. 589, 598, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977));* See also *Penner v. King, 695 S.W.2d 887, 891* (Mo. banc 1985). To the extent a Constitutional right to privacy has been recognized, that right has been extended to protect an individual's interest in preventing the disclosure of personal matters. *State ex rel. Callahan v. Kinder, 879 S.W.2d 677, 681 (Mo. App. W.D. 1994); City of Springfield, 951 S.W.2d at 372.*

Entering into a contract with a public governmental [**26] entity is simply not a personal matter. No private individual or entity entering into a contract with a public governmental [*122] entity can have a reasonable expectation of privacy with regard to the such a contract except to the extent those contracts, or portions thereof, fall within an exception set forth in § 610.021. Contracts entered into by governmental entities are precisely the type of records the Sunshine Law seeks to provide to the public. "The clear purpose of the Sunshine Law is to open official conduct to the scrutiny of the electorate." *Hyde v. City of Columbia, 637 S.W.2d 251, 262 (Mo. App. W.D. 1982).* To prevent the disclosure of contracts that public governmental bodies enter into with private entities or individuals would significantly inhibit this purpose. Section 610.021 provides specific exceptions to the Sunshine Law that would be applicable to prevent the disclosure of certain contracts or portions thereof at certain stages of negotiation. Section 610.021(12) provides that sealed bids and related documents may be closed until the bids are opened or all bids are accepted or rejected. Section 610.021(11) provides that specifications for competitive bidding [**27] may be closed until the specifications are officially approved by a public governmental body or the are published for bid. Section 610.021(2) allows a public governmental body to close records relating to the leasing, purchase or sale of real estate where public knowledge of the transaction might adversely affect the legal consideration therefor until the execution of the lease, purchase or sale. It is clear from these exceptions that the Legislature intended that contracts involving public governmental bodies become public records once they are accepted and finalized. The constitutional right to privacy did not prevent the disclosure of contracts the Board of Trustees and NKC Hospital entered into with third persons.

Finally, the trial court found that any employment agreements were "individually identifiable personnel records" which could be closed under § 610.021(13). n8 However, § 610.021(13) specifically exempts "salaries" from its coverage, and employment contracts have been held not to be "individually identifiable personnel records" falling within the ambit of § 610.021(13). *Librach v. Cooper, 778 S.W.2d 351, 355-56 (Mo. App. E.D. 1989).* "Public employees [**28] may not wish their employment contracts known, but this personal desire is insignificant when contrasted to the public's interest in knowing what their public servants are being paid and under what terms and conditions." *Id. at 355.* Furthermore, the disclosure of employment contracts is not likely to significantly jeopardize the privacy of employees. Id. "The General Assembly did not expressly create an exception for employment contracts, and we decline to do so by implication." Id. The trial court erred in applying § 610.021(13) to employment agreements.

n8 Section 610.021(13) allows public governmental bodies to close "individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such." § 610.021(13).

For the foregoing reasons, we conclude [**29] that the documents requested by St. Luke's are public records and must be made available as requested. While we reach this conclusion based on the provisions of the Sunshine Law, we do so with a firm conviction that the Legislature neither contemplated nor intended that private health care providers would use the law to gain a competitive advantage over much needed public institutions. Widespread use of the law for this purpose could have a devastating impact on public health care facilities throughout the state. Nonetheless, we must decline NKC's invitation to judicially amend the Sunshine Law to protect the requested records from competitive scrutiny. Statutory amendment is the prerogative of the Legislature.

The judgment of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Joseph M. Ellis, Presiding Judge

All concur.

APPENDIX A

1. Names of all Board Members and current addresses of each Board Member of NKC Hospital and Related Entities.
[*123]
2. Copies of all minutes of meetings of the Board of NKC Hospital and Related Entities, together with attachments to said minutes, for the last three (3) [**30] years.

3. Copy of resolution adopted by NKC Hospital and/or Related Entities approving and authorizing or ratifying the agreement between the City of Smithville and NKC Hospital dated July 15, 1996, and the Hospital Lease be-

tween the City of Smithville and Spelman Community Medical Center.

4. Copy of any and all resolutions adopted by NKC Hospital to form or establish Related Entities and the Articles of Incorporation and Bylaws for each Related Entity.

5. Resolution authorizing the funding of all Related Entities and copies of all documents related to the funding of Related Entities.

6. Copies of all monthly financial statements for the last three (3) years of NKC Hospital and all Related Entities.

7. Copies of any and all contracts, documents and agreements between NKC Hospital and Health Midwest or any hospitals within the Health Midwest System or entities affiliated with the Health Midwest System; copies of any and all affiliation agreements, right of first refusal agreements, or option agreements between NKC Hospital and Health Midwest or any hospital within the Health Midwest System or entities affiliated with the Health Midwest System; any and all contracts, [**31] documents, and agreements between NKC Hospital or its Related Entities and Health Midwest or hospitals within the Health Midwest System or entities affiliated with Health Midwest.

8. Copies of all legal billings and detail supporting legal billing from lawyers or law firms providing services to NKC Hospital and Related Entities for the last three (3) years.

9. Copies of all contracts, documents, and agreements, including, but not limited to physician agreements (whether the physician is employed, hospital based or an independent contractor), and employment agreements entered into by NKC Hospital and any Related Entities.

10. Copies of all business plans and strategic plans of NKC Hospital and Related Entities.

11. Copies of all contracts, agreements, documents and memorandums by and between NKC Hospital and any Related Entities.

12. Copies of all agreements, contracts, documents and billing statements pursuant to such agreements between NKC Hospital or any Related Entities and any consultants, including, but not limited to Barkley & Evergreen, Richard E. Moore, Arthur Clark Associates, Inc., Steve Hurst, Ron Hammerle, and Craig Elmore and/or JJEDCO Services.

13. [**32] Copies of any and all agreements between NKC Hospital or any Related Entities and the following:

TriSource Healthcare, Inc.

Blue Cross/Blue Shield (including any related or affiliated plans);

CIGNA;

HUMANA;

Principal;

PruCare; and

Kaiser/Permanente

14. Copies of any and all agreements, contracts and documents between NKC Hospital or any Related Entities and the City of Chillicothe, Board of Trustees of the Excelsior Springs Medical Center and the Creekwood Ambulatory Surgery Center (or any entities which owned or operated the center), or any agreements, contracts or documents relating to the purchase of the Creekwood Ambulatory Surgery Center.

15. All correspondence between NKC Hospital or Related Entities (or the attorneys for the same) and the Missouri Health Facilities Review Committee, the Missouri Department of Health, or any other governmental department, entity, or agency regarding the construction or establishment of a hospital in the City of Smithville or the management or acquisition of Saint Luke's Northland Hospital -- Smithville Campus.

16. All financial data, budget, or other such information relating to the projected costs of the development [**33] and operation of a trauma center or emergency room at the Saint Luke's Northland Hospital -- Smithville Campus.
[*124]
17. Any documents evidencing the funds, if any, currently encumbered by NKC Hospital or Related Entities for the development, acquisition or operation of the Saint Luke's Northland Hospital -- Smithville Campus.

18. All documents, including but not limited to appraisals, both formal and informal, which discuss the value of Saint Luke's Northland Hospital -- Smithville Campus.

19. All studies, reports, analyses, investigations, or other such documents regarding the health care needs of the citizens of Smithville and surrounding communities.

20. All studies, reports, analyses, investigations, or other such documents regarding the potential antitrust implications of the acquisition of the Saint Luke's Northland Hospital -- Smithville Campus by the City of Smithville with the subsequent leasing of the facility to NKC Hospital.

21. Any surveys, reports, analyses, studies, or other such documents regarding the development, acquisition, use, or operation of the Saint Luke's Northland Hospital -- Smithville Campus.

22. Any surveys, reports, analyses, [**34] studies, or other such documents regarding environmental, structural, and mechanical inspections of the Saint Luke's Northland Hospital -- Smithville Campus.

23. Any surveys, reports, studies, analyses, or other such documents regarding the construction, establishment or lease of a hospital in the City of Smithville and/or the financial viability of such a facility.

24. Any surveys, investigations, reports, studies, analyses, or other such documents regarding the purchase or lease of lands for hospital and/or health care purposes by NKC Hospital or Related Entities.

APPENDIX B

With reference to the numbered paragraphs of your letter, you are advised that the following records will be available to you for inspection and duplication . . .:

Request #:

1. Names and addresses of the Board members of the Hospital and Meritas Corporation.

2. Minutes of the open meetings of the Board of Trustees of the Hospital from July, 1993, to June, 1996.

4. Documents related to the establishment of Meritas Health Corporation, including Articles of Incorporation and Bylaws.

5. Any resolutions authorizing the funding of Meritas Health Corporation will [**35] be obtainable through a review of the minutes referenced in paragraph 2 herein. Access to documents relating to the funding of Meritas or any other entity or transaction not referenced in the open minutes of the Hospital Board of Trustees or attached thereto by Resolution is denied.

6. Financial information pertaining to the Hospital for the last 3 years will be obtainable through a review of the minutes referenced in paragraph 2 herein.

We are unaware of the existence of any records of the type described in paragraphs 15 and 20 of your letter.

Pursuant to Mo. Rev. Stat. Section 610.010 et seq., you are advised that access is denied with respect to each and every other request for inspection of records contained in your letter, specifically paragraphs 3, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 21, 22, 23, and 24.

843 S.W.2d 353 printed in FULL format.

STATE ex rel. BOARD OF TRUSTEES OF THE CITY OF NORTH KANSAS CITY MEMORIAL HOSPITAL, Relator, v. HONORABLE DAVID W. RUSSELL, Judge, Circuit Court, Clay County, Respondent.

No. 74606

SUPREME COURT OF MISSOURI

843 S.W.2d 353; 1992 Mo. LEXIS 137

December 18, 1992, Filed

CORE TERMS: sovereign immunity, entity, immunity, proprietary, municipality, public entity, third class, writ of prohibition, waive, corporate existence, body corporate, endorsement, immune, hospital district, municipal, levied, voters, board of trustees, liability arising, public entities, common law, coverage, voted, law providing, proper party, sovereign, discogram, patient, perpetual succession, housing authority

COUNSEL: [**1]

FOR RELATOR: William L. Yocum, William E. Quirk, Michael S. Ketchmark, 120 W 12th Street, Kansas City, MO 64105.

FOR RESPONDENT: John H. Norton, 6000 N. Oak Trafficway, #201, Kansas City, MO 64118, John B. Ewing, Jr., 1022 Crescent Street, Sarasota, FL 34242, John W. McKay, 1125 Commerce Bank Bldg., Kansas City, MO 64106.

JUDGES: En Banc. THOMAS

OPINIONBY: ELWOOD L. THOMAS

OPINION: [*354] ORIGINAL PROCEEDING IN PROHIBITION

This case presents the issue of whether and to what extent sovereign immunity shields a Chapter 96 city hospital from liability for medical malpractice. That a city enjoys immunity from liability arising from operation of a hospital is well settled. See, e.g., *Zummo v. Kansas City, 285 Mo. 222, 225 S.W. 934 (1920)*. We conclude that the result is no different when the hospital is operated by a board of trustees pursuant to Chapter 96, RSMo.

I. FACTUAL AND PROCEDURAL BACKGROUND

The dispute arises from a medical malpractice suit in Clay County and is before us on a petition for a writ of prohibition filed by the Board of Trustees of the City of North Kansas City Hospital ("Board"). In September of 1986, the plaintiffs sued the City of North Kansas [**2] City ("City") and the individual members of the Board. n1 The complaint alleges medical malpractice in the performance of discograms. n2 The complaint also alleges negligence in the supervision of discograms, in the lack of procedures for safely conducting this test, and in the use of the test at all. All of the allegations of negligence on the part of the hospital relate, in one way or another, to the provision of a medical service to the plaintiffs.

n1 The suit also named other defendants who have no claim to sovereign immunity.

n2 A discogram is a type of x-ray procedure in which a contrast medium is injected into the spaces between the bones of the patient's spine or into the discs separating those bones. The plaintiffs claim that the defendants in this case did not use sterile needles to inject the contrast medium and that, as a result, they contracted disc-space infections.

In April of 1987, the parties stipulated that the Board was the proper party to represent the hospital rather than the [**3] City or the individual members of the Board. As a part of this stipulation, the Board agreed not to raise any defense that it was not the proper party. The City and the individual members of the Board were then dismissed from the case. The Board remains as the only representative of the hospital.

In November of 1991, the Board moved for summary judgment based upon sovereign immunity. Judge

Russell denied that motion. The Board then sought a writ of prohibition from the Court of Appeals, Western District, to prohibit Judge Russell from continuing to exercise jurisdiction over the Board in this lawsuit. The court of appeals denied the petition for the writ.

II. THE REMEDY OF PROHIBITION

The Board then sought the same writ from this Court. We granted a preliminary writ of prohibition to examine the [*355] issue of sovereign immunity and now make our writ absolute. Because, as explained below, the Board is entitled to the protection of sovereign immunity, it is within this Court's discretion to issue a writ of prohibition. See *State ex rel. St. Louis Housing Authority v. Gaertner, 695 S.W.2d 461* (Mo. banc 1985). Where a defendant has the defense of sovereign [**4] immunity, "prohibition is the appropriate remedy to forbear patently unwarranted and expensive litigation, inconvenience and waste of time and talent." *State ex rel. New Liberty Hospital District v. Pratt, 687 S.W.2d 184, 187* (Mo. banc 1985). Where a defendant is clearly entitled to immunity, it is not necessary to wait through a trial and appeal to enforce that protection.

III. STRUCTURE OF THE BOARD OF TRUSTEES

The Board argues that it is a public entity created by the legislature to operate a hospital owned by the City. Under the Board's analysis, it is entitled to sovereign immunity because it is an arm of the state, functioning separately from the City. The plaintiffs respond that the Board is not a public entity because it is neither created by the legislature nor subject to local control. Because it is not a public entity, the plaintiffs argue, the Board is not entitled to any protection from suit.

The parties to this dispute disagree as to whether the Board is a public or private entity, but, in framing the issue in this manner, they ignore the possibility that the Board is not an "entity" but rather a part of the City of North Kansas City. To determine [**5] whether the Board is actually entitled to sovereign immunity, we must first decide whether the Board is a cognizable entity at all. A careful examination of the Board and its relationship with the City reveals that it is not.

A. The Statutory Scheme

A full understanding of the nature of the Board requires an understanding of the statutory framework under which the Board operates. North Kansas City Hospital was created under Chapter 96, RSMo, specifically sections 96.150, RSMo Supp. 1991, through 96.228. n3 The statute creating the predecessors to these sections was entitled "AN ACT to authorize cities of the third class to purchase, erect, lease, equip and maintain grounds and buildings for hospital purposes and to conduct and operate such hospital." 1921 Mo. Laws 46 (1st Extra Session). The act does not describe itself as creating an entity to run hospitals for cities that own them. Rather, the title shows that the act was intended to give third class cities a means of operating hospitals. n4

n3 All sections are RSMo 1986, unless otherwise noted.

n4 Before this law was enacted, cities of the third class had the power to operate hospitals. § 8294 RSMo 1919. In fact, cities of the third class have had the power to operate hospitals since the first law classifying cities was enacted in 1877. See 1877 Laws Mo. 165 § 21. Through amendments and reenactments that effected only minor changes, this law adopted in 1877 continues in force today as section 77.530, RSMo.

[**6]

Currently, Chapter 96 provides a mechanism for voters to petition for a tax to support a hospital. Section 96.150.1 provides that "when one hundred voters of any city of the third class shall petition the mayor and council asking that an annual tax . . . be levied for . . . a health care facility in such city . . . the mayor and council shall submit the question to the voters." § 96.150.1, RSMo Supp. 1991. The statute specifies that the form of the question shall be in substantially the following form:

Shall there be . . . . cent tax for . . . . (establishment of, equipping, operating and maintaining) a . . . . (hospital, nursing home, or convalescent home, etc.) in the city for the care and treatment of the sick, disabled and infirm?

§ 96.150.2 (Supp. 1991). Upon a two-thirds vote, the tax is levied and set aside in a separate fund for the facility. § 96.150.3, RSMo Supp. 1991.

Chapter 96 also includes provisions relating to the powers of boards of trustees. [*356] Specifically, "the trustees shall have authority to operate, maintain and manage a hospital and hospital facilities, and to make and enter into contracts . . . ; to make and enter into leases [**7] [with some limitations] . . . ; and further to provide rules and regulations for the operation, management or use of a hospital. . . ." § 96.150.5 RSMo Supp. 1991. Nowhere in Chapter 96 is a board granted a corporate or political existence, perpetual succession, or existence after dissolution of its city. Neither is a board granted the power to sue and be sued, to tax, to issue

bonds, or to hold property except as "special trustees."

The structure of a Chapter 96 board of trustees requires a close relationship between a board and its city. The members of a board are subject to control of the city because membership on the board depends upon selection by the city government. The members of a board are selected by the mayor with the approval of the council. § 96.160. The members of a board may be removed for any of the reasons listed in the statute upon a majority vote of the council. § 96.175. Even the size and composition of a board may, within limits, be varied by the city council. § 96.160. Furthermore, the funds of a Chapter 96 hospital are tied to the city. The tax is levied by the city following approval by the voters of the city. § 96.150.3. The tax is [**8] levied and collected in the same manner as other municipal taxes. Id.; § 96.220. Any bonds issued for the hospital are issued by the city, upon recommendation of the board. § 96.222. Although a board has control of the expenditures of funds to operate the hospital, the funds are kept in the city treasury. § 96.190. The funds are kept separate from other city monies, but the board must annually make a "detailed report to the city council, showing the receipts of all funds and the expenditures therefrom, and showing each donation and amount thereof." § 96.200.

B. Comparison with Other Boards and Entities

That the Board is not an entity becomes clearer when the Board and Chapter 96 are compared with entities that have been recognized as such. The recent opinions of this Court contain examples of "public entities." See, e.g., *State ex rel. Regional Justice Information Service Commission v. Saitz, 798 S.W.2d 705, 707* (Mo. banc 1990) (REJIS, created under authority of § 70.260); *State ex rel. Trimble v. Ryan, 745 S.W.2d 672* (Mo. banc 1988) (Bi-State Development Agency, an interstate compact agency formed under authority of § 70.370); [**9] *State ex rel. St. Louis Housing Authority v. Gaertner, 695 S.W.2d 460, 463* (Mo. banc 1985) (municipal housing authority created under Chapter 99); State ex rel. *New Liberty Hospital District v. Pratt, 687 S.W.2d 184* (Mo. banc 1985) (hospital district created under Chapter 206). These diverse entities have varying and distinct powers appropriate to fulfill the purposes for which they were created. However, all of these entities share the common feature of enabling statutes that expressly grant them corporate existence. See, e.g., § 70.260.2, RSMo Supp. 1991 (REJIS, "a body corporate and politic"); § 70.370, art. III (Bi-State, "a body corporate and politic"); § 99.080.1 (housing authority "shall constitute a municipal corporation" and have power "to have perpetual succession"); § 206.010.2 (hospital district "shall be a body corporate and political subdivision of state"). The Board, on the other hand, has no existence except through the continued existence of the City of North Kansas City. n5

n5 At oral argument, counsel for both parties argued that the Board and the hospital would continue to exist if the City were to dissolve. However, neither offered any authority for such a position. It appears that they are incorrect. While the Board could continue the hospital as a private enterprise, they would no longer be acting under Chapter 96 if the City ceased to exist. The many statutory provisions tying the Board to the City allow no other conclusion.

[**10]

While the Board has some features in common with some of the entities in these cases, it lacks the fundamental feature of an existence separate and distinct from that of the City. Like the St. Louis Housing Authority, the Board is selected and may be removed by the city government. See *St. Louis Housing Authority, 695 S.W.2d 460.* [*357] Like the New Liberty Hospital District, the Board operates a public hospital. See *New Liberty Hospital District, 687 S.W.2d 184.* But, both of these entities are specifically granted corporate existence and do not depend upon any other entity for their existence. It is this aspect of the entities involved in these previous cases that sets them apart from the Board in this case. Aside from the entities that have been before this Court in sovereign immunity cases, the statutes have other examples that provide useful comparisons.

The Board essentially argues that the legislature created the Board as an independent arm of the state, rather than a part of the City, for the sole purpose of running a hospital for the City. The legislature could have created such an entity, if it had wished. The law providing for hospital districts [**11] permits such an independent entity. See § 206.010.2. The statutes contain other examples of independent entities that might be created by the citizenry, such as the city library district, which "shall be a body corporate." § 182.140. Street light maintenance districts are "to have perpetual existence." § 235.150. And if you create an ambulance district, it "shall be a body corporate and a political subdivision of the state." § 190.010. The legislature did not include any grant of separate existence when it enacted the original law providing for city hospitals in third class cities. Neither has it added such a grant in any of the amendments to the law. The most recent amendment occurred in 1987 and explicitly listed the authority of a Chapter 96 board

of trustees but did not give the board any authority to have perpetual succession or to be a body corporate. See § 96.150.5, RSMo Supp. 1991. Lacking any separate existence, the Board is not an entity but is a part of the City of North Kansas City. n6

n6 At the time the citizens of North Kansas City voted to impose a city hospital tax, the law providing for hospital districts had not yet been enacted. If the citizens wanted to, they could have voted to create a hospital district with boundaries coextensive with the city limits and had the Board transfer the hospital to the hospital district. Since 1961, however, citizens have had the option to create a hospital district under Chapter 206 rather than a city hospital run under Chapter 96. The procedures are similar, but the results are slightly different. Hospital districts are not dependent upon city governments for their existence.

[**12]

Not all of the statutes defining some part of government create "entities." Statutes similar to the sections in Chapter 96 grant authority for zoning commissions and boards of adjustment, §§ 89.070-89.090, park boards in third class cities, §§ 90.500-90.570, and boards to operate municipally owned utilities, §§ 91.270, 91.480. The statutes do not grant corporate existence or political subdivision status to these boards either. These statutes govern the operation of parts of city government in the same way sections 96.150 through 96.228 govern operation of the Board. The statutes granting authority to the Board are like the statutes setting forth the powers of the mayor and city council in third class cities. See §§ 77.060-77.360. A city council has no corporate existence either. Rather, the city has corporate existence. § 77.010. A city has the power to sue and be sued, while the city council does not. n7 See id. Thus the Board is not a "public entity" in its own right, but rather a part of the City, and, for purposes of sovereign immunity, the Board enjoys such immunity as the City would enjoy.

n7 We need not reach the issue of whether the Board has the ability to sue and be sued apart from the City's powers. The City was previously a defendant in this case and, by stipulating that the Board was the proper party to defend the suit, agreed to allow the Board to conduct the suit on its behalf. Thus we do not decide the issue faced by the Court of Appeals in *Board of Trustees v. Conway, 675 S.W.2d 36 (Mo. App. 1984).*

[**13]

IV. SOVEREIGN IMMUNITY

Because of the peculiar history of sovereign immunity in Missouri, a proper understanding of the current law requires a review of the past. The law of sovereign immunity was a common law doctrine applied, modified, and interpreted by the courts of Missouri until September 12, 1977. On that date, this Court prospectively [*358] abrogated the doctrine of sovereign immunity effective August 15, 1978. *Jones v. Missouri Highway Commission, 557 S.W.2d 225* (Mo. banc 1977). The legislature responded by enacting sections 537.600 through 537.650, which revived the immunity existing immediately prior to the Jones decision, with some modifications. More than once since enacting the statute, the legislature has amended it in response to judicial interpretation of sovereign immunity law. See *Wollard v. City of Kansas City, 831 S.W.2d 200, 202* (Mo. banc 1992) (describing history of one such amendment). Now, issues of sovereign immunity require examination of the statute and reference to the pre-Jones common law.

A. "Public Entity" Status as a Threshold

The first analytical step in our sovereign immunity cases has often been [**14] determining whether the defendant was a "public entity" under section 537.600, RSMo Supp. 1991. See, e.g., *Stacy v. Truman Medical Center, 836 S.W.2d 911* (Mo. banc 1992) (discussing certain factors for determining status of "hybrid" entities). In some cases this is a difficult determination because there are a number of "hybrid" entities that are not easily classified as public or private. In this case, however, we need not spend much effort. The City of North Kansas City would have been entitled to sovereign immunity prior to September 12, 1977, and is a public entity within the meaning of section 537.600. Thus, the City is entitled to the sovereign immunity afforded by the statute and the common law.

B. The Statutory Exceptions

The next step is to examine whether the injury complained of falls within either of the two categories for which immunity is expressly waived by section 537.600, i.e., injuries arising from negligent operation of motor vehicles and dangerous conditions of property. If the injury falls within these categories, the defendant is not immune. Liability is capped at $ 100,000 per injured person by the statute, however, regardless of whether [**15] the defendant would have been immune prior to the adoption of sections 537.600-537.650. See *Wollard, 831 S.W.2d 200.* The injuries alleged in this case do not fall within these categories, nor do the parties argue that

they should.

C. The Governmental/Proprietary Distinction

When, as in this case, the defendant is a municipality, the analysis focuses on the activity giving rise to the injury to determine whether the activity was an exercise of a governmental or a proprietary function. The question is significant because, before September 12, 1977, municipalities did not enjoy complete sovereign immunity. Rather, they were immune from liability arising from their governmental activities but were not immune from liability arising from their proprietary activities. n8

n8 There is some confusion in the cases as to whether this governmental/proprietary distinction applies to any public entities other than municipalities. It may be that prior to September 12, 1977, the distinction applied to school districts also. See State ex rel. *Allen v. Barker, 581 S.W.2d 818* (Mo. banc 1979); but see *REJIS, 798 S.W.2d at 707,* and *Wollard, 831 S.W.2d at 203.* Because the defendant here is a municipality, the distinction applies, and we need not determine whether it would apply in other cases.

[**16]

The statutes and amendments enacted by the legislature have modified the governmental/proprietary distinction to a certain extent, as recently explained by this Court. See *Wollard, 831 S.W.2d 200.* In Wollard, we determined that the governmental/proprietary distinction was irrelevant within the areas covered by section 537.600, i.e., negligent operation of motor vehicles and dangerous conditions of property. As we noted in that case, "the common law governmental/proprietary test retains vitality only in suits against municipal corporations that do not involve the express waivers contained in § 537.600." *Wollard, 831 S.W.2d at 203.* The 1985 amendment we considered in Wollard by its very terms only covers those express waivers. Therefore, we conclude, as in Wollard, that the governmental/proprietary distinction remains [*359] in effect for municipalities with respect to any tort not within the areas covered by sections 537.600.1 and 537.600.2. n9

n9 Because we conclude that this suit arises from the exercise of a governmental function, we need not reach the issue of whether the liability cap of section 537.610.2 is applicable to a proprietary function not falling within the scope of the two statutory exceptions.

[**17]

D. Hospitals are Governmental

The alleged negligence in this case arose from the provision of medical services in a city hospital. The operation of a hospital by a city has traditionally been held to be governmental. See, e.g., Schroeder v. City of St. *Louis, 228 S.W.2d 677 (Mo. 1950); Zummo v. Kansas City, 285 Mo. 222, 225 S.W. 934.* That a hospital is governmental has been so well settled that in recent cases no detailed explanation has been necessary and the bare citation of authority has been sufficient support for the proposition. See, e.g., *New Liberty Hospital District, 687 S.W.2d at 486.* The plaintiffs do not offer any arguments sufficient to change this conclusion.

The plaintiffs argue that the operation of this particular hospital is a proprietary function of the City. They offer to show that the hospital has a substantial advertising budget designed to attract private patients, that the hospital has a surplus of revenue over expenses, and that the hospital has assets of $ 133 million compared to liabilities of only $ 9 million. Essentially, the plaintiffs argue that the Board competes with private hospitals and makes money doing [**18] it.

The plaintiffs' point about competition is well-taken, but not dispositive. It may not be entirely fair for the City to compete with private companies in providing health services. However, the City also provides police protection in competition with private security companies. Further, laying out, building, and maintaining city streets are proprietary functions, but ones in which cities have no competition. Mere competition with private enterprise is insufficient to divest an activity of its governmental character. Nor does the absence of competition prevent a city's actions from being proprietary.

The plaintiffs' arguments regarding the revenues and assets of the hospital are less persuasive. In the past, we have noted that a patient paying for services in a hospital does not change the governmental character of the hospital. See *New Liberty Hospital District, 687 S.W.2d at 186* (citing *Schroeder, 228 S.W.2d at 678).* In 1954, the people of North Kansas City voted on the measure to impose the hospital tax under section 96.150. In 1958, after another vote to authorize a bond, the hospital finally began operation. The plaintiffs do not claim or offer [**19] to prove that the hospital was formed with the intention of making money. Rather, they assert that there has been a surplus of revenue over expenses in fiscal years ending in 1989 and 1990. The fact that a city hospital brings in more than it spends in a given fiscal period does not strip it of its governmental character.

In examining the question of whether an activity is governmental or proprietary, the nature of the particular defendant's conduct is often less important than the generic nature of the activity. Rather than examining the motives of the city employees who were performing the function, the analysis focuses on the motives of the legislature that conferred the power upon all municipalities. Why the City is operating this hospital now is less relevant than why the state allows cities of the third class the power to operate hospitals and why cities would want to have hospitals at all. Even if the sole motivation of the city government were profit, the hospital would still be governmental. The status of a function of a city does not vary from day to day with the whims of the particular people elected or appointed to municipal offices. The generic fact that cities [**20] begin hospitals to provide health care to the people and the historic fact that Chapter 96 is an effort to allow cities to provide health care amply support the conclusion that the operation of a city hospital is a governmental function.

[*360] E. Insurance as a Waiver of Immunity

The final steps of the analysis involve liability insurance. Even when public entities have full sovereign immunity, they may waive that immunity through the purchase of insurance, as provided in section 537.610. Similarly, municipalities are specifically granted the power to purchase liability insurance by section 71.185, but, as in section 537.610, the purchase of such insurance may waive immunity. Thus, an analysis of a defendant's immunity requires inquiry into the questions of whether there is insurance and whether the insurance waives immunity under the appropriate statutes. In this case, there is some insurance, and we must determine whether the Board waived immunity by purchasing it.

First, section 537.610 permits political subdivisions of the state to purchase insurance and thus waive sovereign immunity. In this case, the Board had purchased a pair of insurance policies with identical [**21] coverage; one was a principal policy and the other an "umbrella" policy. The principal policy includes an endorsement that explicitly disclaims coverage for "ANY CLAIM BARRED BY THE DOCTRINES OF SOVEREIGN IMMUNITY OR OFFICIAL IMMUNITY, EXCEPT ATTORNEY'S FEES AND OTHER LITIGATION COSTS INCURRED IN DEFENDING A CLAIM. NOTHING CONTAINED IN THIS POLICY (OR THIS ENDORSEMENT THERETO) SHALL CONSTITUTE ANY WAIVER OF WHATEVER KIND OF THESE DEFENSES OF SOVEREIGN IMMUNITY OR OFFICIAL [SIC] IMMUNITY FOR ANY MONETARY AMOUNT WHATSOEVER." Exhibit E5 to petition for writ of prohibition (emphasis added). The endorsement also provides that it does cover "claims that arise out of the two perils specifically described in Section 537.600 R.S.Mo." Id. We recently decided that a similar policy, purchased by a county hospital, did not constitute a waiver of sovereign immunity under section 537.610. See *State ex rel. Cass Medical Center v. Mason 796 S.W.2d 621* (Mo. banc 1990). Nothing in this case offers any reason to treat this policy any differently from the one in Cass Medical.

Second, municipalities may purchase insurance and, by doing so, waive the sovereign [**22] immunity that protected them in the exercise of governmental functions. § 71.185. This statute predates section 537.610 by several years, and, as under the new section, immunity is waived only "to the extent of the insurance" purchased. Id. The language of section 71.185 differs from that in section 537.610, but the differences are not material in this case. The endorsement disclaiming coverage of any claim barred by the doctrine of sovereign immunity avoids any waiver of sovereign immunity in this suit. The Board did not waive its sovereign immunity.

The preliminary writ of prohibition is made absolute.

ELWOOD L. THOMAS, Judge

All concur.

G

# CONSTITUTION OF MISSOURI
# ADOPTED 1945
# ARTICLE VI. LOCAL GOVERNMENT FINANCES

## Mo. Const. Art. VI, § 23 (1999)

§ 23. Limitation on ownership of corporate stock, use of credit and grants of public funds by local governments

No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution.

H

630 S.W.2d 574 printed in FULL format.

The City Of Springfield, Missouri, a municipal corporation, et al., Appellants, v. Richard J. Fredricks, Director of the Division of Insurance, et al., Respondents

No. 62287

Supreme Court of Missouri, Division Two

630 S.W.2d 574; 1982 Mo. LEXIS 373

April 6, 1982

PRIOR HISTORY: [**1]

From the Circuit Court of Cole County

Civil Appeal

Judge Byron L. Kinder

DISPOSITION: Reversed and Remanded.

CORE TERMS: municipality, insured, municipal, excise tax, taxation, carriers, insurer, premium, taxing, manifestation, statutorily, water, tax imposed, sales tax, void, protest, surplus, procures, excise

COUNSEL: Turner White, Springfield, Missouri, Attorney for Appellants.

John Ashcroft, Christopher M. Lambrecht, Jefferson City, Missouri, Attorneys for Respondents.

JUDGES: Welliver, P.J., Seiler, Higgins, JJ., concur, Stockard, C.

OPINIONBY: PER CURIAM; STOCKARD

OPINION: [*575] The City of Springfield, a municipal corporation, brought this action in two counts; Count I for the return of taxes paid under protest, and Count II for the cancellation of a penalty for the late payment of the tax.

Springfield owns, and operates by use of a Board of Public Utilities, all of its utilities, including electric, gas, water, and transportation services. The Board procures insurance on substantially all facets of its operations, in some instances directly from the insurers and in some instances through brokers. Neither group does business in the State of Missouri.

Missouri taxes several phases of the insurance industry, principally by use of a "premium tax" measured by a percentage of the premiums collected by the insurers as the result of business done in this State. See § 148.370 RSMo 1978. [**2] Not all risks in this State that are insured are covered by policies written by carriers admitted to do business in this State. Insurance risks which present some novel aspect, or are extremely large, are frequently written by carriers not admitted to do business in Missouri, and such carriers are referred to as surplus line insurers. Generally such carriers have insufficient contact with this State to be subject to the premium tax.

In 1977 the Legislature adopted "The Surplus Line Law," Chapter 384, RSMo 1978, one section of which, § 384.160.4, imposes a tax for "the general support of the government" upon "the insured" who obtains coverage from a surplus line insurer in an amount equal to 5% of the premiums paid on insured risks in Missouri. The amount of the tax was computed and assessed by the Director of the Division of Insurance, and the City of Springfield paid the tax under protest. By Count I it now seeks to recover the amount so paid. Pursuant to § 384.170 the Director of Revenue assessed a penalty of 50% of the tax, and by Count II the City seeks the abatement of that penalty.

The City contended and now contends that § 384.160.4 is void as applied to it because the [**3] statute purports to impose a tax on property of the City, which admittedly is a political subdivision of the State, *State ex rel. Arenson v. City of Springfield, 332 S.W.2d 942* (Mo. banc 1960), in violation of Art. X, § VI of the Constitution of this State. It is there provided that "All property, real and personal, of the state, counties and other political subdivisions, * * * shall be exempt from taxation * * *."

We deem it unnecessary to rule specifically whether the tax imposed by § 384.160.4 is a tax on property or an excise tax. If it is a tax on property it is void in its application to the City of Springfield. If, on the other hand, it is an excise tax, then we agree with the

contention of the City of Springfield that § 384.160.4, RSMo 1978, does not by its express terms include municipal corporations as being subject to the tax.

The precise wording of the taxing provision is as follows:

"4. For the general support of the government of this state there is levied upon the insured who procures insurance pursuant to subsections 1 and 3 of this section a tax at the rate of five percent of the net amount of the premium in respect of risks located in this state * * *." [**4]

[*576] The term "insured" is not statutorily defined although several other terms used in the statute are so defined.

In *State ex rel. Missouri Portland Cement Co. v. Smith, 338 Mo. 409, 90 S.W.2d 405* (banc 1936), the issue was whether the sales tax, an excise tax, applied to the State Highway Department. The tax was imposed directly upon the "sale, service or transaction," and required the seller to collect the tax from the purchaser, or recipient of the service. On the issue of whether the then constitutional provision (Const. of Mo. 1875, Art. 10, § 6) against taxing property of a governmental subdivision was applicable, it was stated: "The weight of authority seems to be that, as applied to counties, municipalities, and other subdivisions, exemption from property tax does not ordinarily extend to excise taxes." This is the general rule. Vol. 16 McQuillin, Municipal Corporations, § 44.68. Therefore, when we consider the tax imposed by § 384.160.4 to be an excise tax, it is not prohibited by Art. 10, § VI, Const. of Mo. 1945.

In *Commonwealth ex rel. Luckett v. City of Elizabethtown, 435 S.W.2d 78, 80 (Ky. App. 1968),* the court commented: "As a strictly logical [**5] proposition it is difficult to see what is to be gained by one governmental unit taxing another," but the court added that the legislature had the power to do so if it so desired absent some constitutional restriction. See also 84 C.J.S. Taxation § 202. As a result of this reasoning there has developed a general but uniform rule that when there exists the power to tax and "a tax levy is made in general terms with nothing to indicate that it was intended to apply to a city or a county it will be held not to apply." *City of Anniston v. State, 265 Ala. 303, 91 So.2d 211, 212 (1956).* For example, in *Swanton Village v. Town of Highgate, 131 Vt. 318, 305 A.2d 586 (1973),* it was stated that it was contrary to the policy of that state to subject its own property "or that of its municipalities" to a general tax "absent the most positive legislative enactment," and in *State v. City of Madison, 55 Wis.2d 427, 198 N.W.2d 615 (1972),* it was held that there must be "a clear manifestation of the intent to tax" before State property can be subject to taxation. In *Central Lincoln People's Utility District v. Stewart, 221 Or. 398, 351 P.2d 694 (1960),* it was stated that "The intention [**6] to tax a municipality is not to be inferred, but must be clearly manifested by an affirmative legislative declaration." It has in one case been held that this clear manifestation cannot be by reason of "a general taxing statute, but [the tax] must be * * * by special legislation." *Northern Wasco County People's Utility District v. Wasco County, 210 Or. 1, 305 P.2d 766 (1957).* See also *Styles v. Village of Newport, 76 Vt. 154, 56 A. 662 (1904);* 84 C.J.S. Taxation, § 202. See also a clear and succinct statement of the rule in Vol. 2, Cooley, Taxation, 4th Ed., § 621.

In *City of Webster Groves v. Smith, 340 Mo. 798, 102 S.W.2d 618 (1937),* the State imposed an excise tax in the form of a sales tax on the privilege of engaging in the business of selling water, and it sought to apply the tax to the City of Webster Groves which was selling water to its inhabitants. The imposition of the tax was upon a "person" which was statutorily defined to include "any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number." [**7] After reviewing the "act as a whole" the court stated that it found "no language or provisions therein from which an implication necessarily arises that it was the legislative intent to include a municipal corporation within the act," and the court then concluded that "the word 'corporation' as used does not include a municipality and therefore a municipality is not within the act." The act was soon thereafter repealed and reenacted, and the definition of a "person" subject to the tax was changed to include, among other things, "corporation, municipal or private." Laws of Missouri 1939, p. 855.

The tax is imposed on "the insured" and this is not statutorily defined to include a municipality. In fact there is nothing to indicate that the Legislature intended to [*577] impose a tax on a municipality. If faced with this issue the Legislature may decide to tax a municipality who qualifies as an "insured," but it has not done so by a clear manifestation of such intent. In these circumstances the City of Springfield is not subject to the tax imposed by § 384.160.4 RSMo 1978.

The judgment is reversed and the cause remanded for further proceedings consistent with the views here expressed. [**8]

PER CURIAM:

The foregoing opinion by Stockard, C., is adopted as the opinion of the court.

Welliver, P.J., Higgins and Seiler, JJ. concur.